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Title:	John D. Ashcroft, former Attorney General, et al., Petitioners v. Javaid Iqbal, et al.
Docketed:	February 6, 2008
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(05-5768-cv, 05-5844-cv, 05-6379-cv, 05-6352-cv, 05-6386-cv, 05-6358-cv, 05-6388-cv)
Decision Date:	June 14, 2007
Rehearing Denied:	September 18, 2007

Questions Presented

---Date---	--------Proceedings and Orders----------
Dec 7 2007	Application (07A482) to extend the time to file a petition for a writ of certiorari from December 17, 2007 to January 16, 2008, submitted to Justice Ginsburg.
Dec 7 2007	Application (07A482) granted by Justice Ginsburg extending the time to file until January 16, 2008.
Jan 4 2008	Application (07A482) to extend further the time from January 16, 2008 to February 6, 2008, submitted to Justice Ginsburg.
Jan 4 2008	Application (07A482) granted by Justice Ginsburg extending the time to file until February 6, 2008.
Feb 6 2008	Petition for a writ of certiorari filed. (Response due March 7, 2008)
Feb 21 2008	Order extending time to file response to petition to and including April 21, 2008.
Mar 7 2008	Brief amici curiae of William P. Barr, et al. filed.
Apr 15 2008	Order further extending time to file response to petition to and including May 9, 2008.
May 9 2008	Brief of respondents Javaid Iqbal, et al. in opposition filed.
May 27 2008	DISTRIBUTED for Conference of June 12, 2008.
May 29 2008	Reply of petitioners John D. Ashcroft, former Attorney General, et al filed. (Distributed)
Jun 16 2008	Petition GRANTED.
Jul 15 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including August 29, 2008.
Jul 15 2008	The time within which to file respondents' brief on the merits is extended to and including October 24, 2008.
Aug 21 2008	Motion to dispense with printing the joint appendix filed by petitioner John

D. Ashcroft, former Attorney General, et al.

Aug 29 2008 Brief of petitioner John D. Ashcroft, former Attorney General, et al filed.

Aug 29 2008 Brief of respondents Michael Rolince and Kenneth Maxwell in support of petitioners filed. (Distributed)

Aug 29 2008 Brief of respondent Dennis Hasty in support of petitioners filed. (Distributed)

Sep 5 2008 Brief amici curiae of William P. Barr, et al. filed.

Sep 8 2008 SET FOR ARGUMENT ON Wednesday, December 10, 2008.

Sep 12 2008 CIRCULATED.

Oct 6 2008 Motion to dispense with printing the joint appendix filed by petitioner GRANTED.

Oct 24 2008 Brief of respondent Javaid Iqbal filed. (Distributed).

Oct 30 2008 Brief amici curiae of Professors of Civil Procedure and Federal Practice filed. (Distributed)

Oct 31 2008 Record received U.S.C.A. for the 2nd Circuit (1 box).

Oct 31 2008 Brief amici curiae of Japanese American Citizens League, et al. filed. (Distributed)

Oct 31 2008 Brief amici curiae of National Civil Rights Organizations filed. (Distributed)

Oct 31 2008 Brief amici curiae of Sikh Coalition, American-Arab Anti-Discrimination Committee, et al. filed. (Distributed)

Oct 31 2008 Brief amicus curiae of American Association for Justice filed. (Distributed)

Oct 31 2008 Motion for leave to file amici brief filed by Ibrahim Turkman, et al. (Distributed)

Oct 31 2008 Letter received from counsel for amici Turkmen, et al. proposing a lodging of non-record material including handwritten notes and records of interviews with "high ranking" government officials.

Nov 17 2008 Motion for leave to file amici brief filed by Ibrahim Turkmen, et al. GRANTED.

Nov 17 2008 Record for the U.S.D.C. for the Eastern District of New York is electronically filed. Docket sheet available. (1 envelope)

Nov 24 2008 Reply of petitioners John D. Ashcroft, former Attorney General, et al filed. (Distributed)

Nov 24 2008 Reply of respondents Michael Rolince and Kenneth Maxwell in support of petitioners filed. (Distributed)

Nov 24 2008 Reply of respondent Dennis Hasty in support of petitioners filed. (Distributed)

Dec 10 2008 Argued. For petitioners: Gregory G. Garre, Solicitor General, Department of Justice, Washington, D.C. For respondents: Alexander A. Reinert, Yonkers, N.Y.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT M. LOEB
SHARON SWINGLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, the following six individuals were parties in the court of appeals. Each of them was a defendant in the district court and an appellant in the court of appeals:

Dennis Hasty, former Warden of the Metropolitan Detention Center; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counter-terrorism Division; Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons; Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation.

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In the Supreme Court of the United States

No.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of John D. Ashcroft, former Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-70a) is reported at 490 F.3d 143. The order of the district court dismissing some, but not all, of the claims against petitioners (App., *infra*, 71a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2007. Petitions for rehearing were denied on September 18, 2007 (App., *infra*, 151a-152a). On December 7, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to January 16, 2008. On January 4, 2008, Justice Ginsburg further extended that time to February 6, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves civil claims brought by Javaid Iqbal (respondent), a citizen of Pakistan who was arrested by federal officials in New York City following the September 11, 2001 attacks and detained at the Metropolitan Detention Center (MDC) in Brooklyn pending trial on charges of conspiracy to defraud the United States and fraud in relation to identification documents. App., *infra*, 3a-4a & n.1. Respondent ultimately pleaded guilty and, after the period at issue in the complaint, was sentenced to a 16-month term of imprisonment and removed to Pakistan. *Id.* at 7a, 73a n.1.

In relevant part, respondent asserts that his detention in highly restrictive conditions of confinement from January to July 2002 resulted from unlawful racial and religious discrimination for which petitioners are personally liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and liable as co-conspirators under 42 U.S.C. 1985(3).[1] See App., *infra*, 201a-203a, 206a-209a (First Am. Compl. ¶¶ 231-236, 246-251 (Compl.)). He seeks compensatory and punitive damages from petitioners, as

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[1] Respondent's remaining claims against petitioners were ordered dismissed on other grounds and are not at issue here.

well as attorney's fees and costs. *Id.* at 202a, 203a, 207a, 209a, 214a (Compl. ¶¶ 233, 236, 248, 251; Prayer for Relief). Respondent also asserts claims against various other Department of Justice officials allegedly responsible for the conditions of his confinement and other alleged mistreatment, including employees of the MDC, the Bureau of Prisons, and the Federal Bureau of Investigation (FBI). *Id.* at 7a n.3, 87a-91a (summarizing claims against each defendant).[2]

In support of his claims against petitioners, respondent alleges that, as Attorney General and FBI Director, they "approved" a policy of detaining suspects determined to be "of high interest" to the FBI's investigation into the September 11th terrorist attacks "in highly restrictive conditions of confinement until they were 'cleared' by the FBI." App., *infra*, 168a (Compl. ¶ 69). Respondent claims that two lower-level FBI officials responsible for implementing that policy selected him as a "high interest" suspect on the basis of discriminatory criteria. See *id.* at 164a-165a (Compl. ¶ 51) (alleging that respondent was selected by defendants Rolince and/or Maxwell as a "high interest" suspect because of his race or religion), 169a (Compl. ¶ 76) (alleging that defendants Rolince and Maxwell refused to clear detainees for release to the general population "based simply on the detainees' race, religion, and national origin").

Respondent also alleges that, "[i]n many cases," detainees were classified as "high interest" because of their "race, religion, and national origin" rather than "any evidence of the detainees' involvement in support-

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[2] One of the other government officials sued by respondent, former Warden Dennis Hasty, has already filed a petition for a writ of certiorari seeking review of the judgment below. See Pet., *Hasty* v. *Iqbal*, No. 07-827 (filed Dec. 17, 2007).

ing terrorist activity," and that, "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September-11th investigation." App., *infra*, 164a, 165a (Compl. ¶¶ 49, 52). With regard to his own treatment, respondent alleges that, more than two months after he was arrested, he was classified as being "of high interest" to the September 11th investigation, and thus transferred from the general population at the MDC to the facility's "Administrative Maximum Special Housing Unit." *Id.* at 165a, 169a (Compl. ¶¶ 53, 80-81).

Apparently seeking to connect petitioners to his "high interest" classification, respondent asserts that, as Attorney General, petitioner Ashcroft had "ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws" and was "a principal architect of the policies and practices challenged here." App., *infra*, 157a (Compl. ¶ 10). Respondent also alleges that, as the Director of the FBI, petitioner Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here." *Ibid.* (Compl. ¶ 11). Respondent further alleges that, "under the direction of [petitioner] Mueller," the FBI "arrested and detained thousands of Arab Muslim men" in the course of investigating the September 11th attacks. *Id.* at 164a (Compl. ¶ 47).

Finally, respondent makes a generalized allegation that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no le-

gitimate penological interest." App., *infra*, 172a-173a (Compl. ¶ 96).

2. Various defendants, including petitioners, moved to dismiss the claims against them. In relevant part, the district court refused to dismiss the *Bivens* and conspiracy claims against petitioners. App., *infra*, 133a-137a, 142a-146a, 150a. The court ruled that allegations that respondent was confined in significantly harsher conditions solely because of his race and religion were sufficient to state a violation of clearly established law, and that he had adequately alleged personal involvement by petitioners in the adoption of the detention policy for "high interest" detainees. *Id.* at 133a-137a, 142a-146a. The court acknowledged that personal involvement was "a closer question" for the defendants (including petitioners) who were higher in the chain of command than the Wardens. *Id.* at 116a. Nevertheless, in light of respondent's general allegations and the "unique context" of the Justice Department's investigation into the September 11th attacks, the court found, with respect to each of the relevant counts, that it could not conclude there is "no set of facts" on which respondent would be entitled to relief from petitioners. *Id.* at 136a-137a, 146a.

3. a. The court of appeals affirmed in relevant part. App., *infra*, 1a-70a. The court focused on "several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11." *Id.* at 2a.

In addressing pleading requirements, the court of appeals specifically discussed four of this Court's decisions. App., *infra*, 15a-27a (citing and discussing *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002); *Crawford-El* v.

Britton, 523 U.S. 574 (1998); and *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007)). It observed that those decisions are "not readily harmonized," *id.* at 15a, and suggested that "[c]onsiderable uncertainty" exists under this Court's precedents concerning "the standard for assessing the adequacy of pleadings," *id.* at 19a. Nevertheless, the court interpreted this Court's precedents as requiring "a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* at 25a.

The court stated that it saw "some merit" to the view that a more rigorous standard should be applied. App., *infra*, 25a. The court explained that "qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation." *Ibid.* Moreover, the court continued, "some of [respondent's] claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement," and allowing such claims to proceed "might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent." *Ibid.* However, the Court believed it was bound by this Court's precedents to apply the "more flexible 'plausibility standard'" it described. *Ibid.*; see *id.* at 25a-26a.

Applying that "plausibility" standard to the claims against petitioners, the court of appeals held that respondent had sufficiently pleaded valid claims against petitioners for racial or religious discrimination and for conspiring to violate his civil rights. App., *infra*, 62a-63a, 65a. The court held that allegations that respondent was deemed to be a "high interest" detainee solely because of his race and religion were sufficient to make

out claims of unlawful discrimination. *Id.* at 59a. The court relied on *Crawford-El* and *Swierkiewicz* for the proposition that conclusory allegations of discriminatory motive are sufficient to survive summary disposition. *Id.* at 61a. The court also relied on respondent's allegations that all Arab Muslim men arrested on criminal or immigration charges in the New York region in the course of the FBI's investigation into the September 11th attacks were initially classified as being "of interest." *Ibid.*

Moreover, the court of appeals held that the allegations against petitioners were sufficient to establish their personal involvement in or responsibility for the alleged discriminatory conduct. App., *infra*, 62a. The court cited respondent's allegations that petitioners "were instrumental in adopting the 'policies and practices challenged,'" that thousands of Arab Muslims were arrested "under the direction of [petitioner] Mueller," and that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [respondent] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Ibid.* Although the court acknowledged that officials other than petitioners were the ones who had selected respondent as a "high interest" detainee, it concluded that fact "does not necessarily insulate Ashcroft and Mueller from personal responsibility for the actions of their subordinates under the standards of supervisory liability." *Ibid.* Thus, the court held that "the allegation that [petitioners] condoned and agreed to the discrimination that [respondent] alleges satisfies [the court's] plausibility standard without an allegation of subsidiary facts." *Ibid.*

b. Judge Cabranes joined the panel's opinion but filed a separate concurrence to "underscor[e] that some of [the Supreme Court's] precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity." App., *infra*, 68a. In particular, Judge Cabranes highlighted the "uneasy" tension between this Court's interpretation of general civil pleading requirements and qualified-immunity doctrine. *Ibid.* Although most of the conduct complained of by respondent was alleged to have been carried out by lower-level officials, Judge Cabranes noted that it is nevertheless "possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and possibly to a jury trial, regarding [respondent's] claims." *Id.* at 69a.

Judge Cabranes also emphasized that concerns about discovery abuse are "all the more significant in the context of a lawsuit against * * * federal government officials charged with responsibility for national security and entitled by law to assert claims of qualified immunity." App., *infra*, 69a. In addition, he observed that "it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 69a-70a. Nevertheless, Judge Cabranes ultimately deemed that troubling outcome to be compelled by the application of the "relevant precedents by a court of inferior jurisdiction." *Id.* at 70a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that cabinet-level officers and other high-ranking officials—in this case, a former Attorney General and the incumbent Director of the FBI—may be subjected to discovery and the demands of litigation (at least through the summary judgment stage) in this *Bivens* action based on bare and conclusory allegations that they knew about and condoned the allegedly discriminatory actions of much-lower-level officials in the Department of Justice in responding to an unprecedented national-security crisis. In addition, the Second Circuit's decision effectively holds that high-ranking officials—including Cabinet officers—may be held potentially liable in *Bivens* suits on a constructive notice theory that is tantamount to imposing *respondeat superior* liability.

This case thus presents two crucially important questions of concerning the scope of the protection afforded high-ranking government officials under qualified immunity principles. First, whether conclusory allegations that high-level government officials had knowledge of alleged wrongdoing by subordinate officials are sufficient to survive a motion to dismiss in an action brought under *Bivens*. And, second, whether high-level officials who lack actual knowledge of the risk that subordinates would engage in wrongdoing may nevertheless be held personally liable on the theory that their official positions gave them constructive knowledge. Those questions are important, and their importance is amplified in the context of high-ranking officials charged with responding to an extraordinary national-security crisis like the September 11 attacks.

Not only are the questions presented of vital importance, but the Second Circuit's decision conflicts with

decisions of this Court and of other courts of appeals. First, the decision conflicts with this Court's holdings on the pleading standards for evaluating claims and the requirements for holding supervisors personally liable under *Bivens* and 42 U.S.C. 1983. While not acknowledging the conflict with this Court's precedents, all the judges on the panel conceded difficulties in applying this Court's precedents and noted the value of clarification. See App., *infra*, 15a (panel decision) (the "guidance" provided by this Court's precedents "is not readily harmonized"); *id.* at 68a (Judge Cabranes) (this Court's precedents are "less than crystal clear and fully deserve reconsideration by [this] Court at the earliest opportunity"). Second, the Second Circuit's decision in this case deepens circuit splits on the questions presented.

Finally, the Second Circuit's decision could have significant, adverse practical consequences. The analysis employed by the court of appeals will significantly undermine the protections afforded by qualified immunity by potentially subjecting high-level government officials to discovery and even a trial based merely on conclusory allegations that such officials knew of or condoned alleged wrongdoing by subordinate officials. And, as this case underscores, it will do so even in the national-security context, where there is an obvious "national interest in enabling Cabinet officers * * * to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, J., concurring in judgment); see *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (the qualified immunity "exists because 'officials should not err always on the side of caution' because they fear being sued"). Indeed, as Judge Cabranes observed, the decision below creates a "blueprint" for "plaintiffs claim-

ing to be aggrieved by national security programs and policies of the federal government * * * to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." App., *infra*, 69a-70a. This Court's review is therefore warranted.

I. Certiorari Is Warranted To Consider What Allegations Are Necessary To Vitiate The Qualified Immunity Of High-Ranking Government Officials From Suit

In holding that a motion to dismiss may be defeated by conclusory allegations that high-level government officials knew about the unlawful conduct of their subordinates, the court of appeals misconstrued this Court's prior decisions. The court of appeals candidly acknowledged that it struggled in interpreting this Court's decisions, App., *infra*, 15a (panel decision); *id.* at 68a (Judge Cabranes), and that there was at least "some merit" to imposing a more rigorous pleading standard than the one described by the court of appeals, *id.* at 25a (panel decision); *id.* at 69a-70a (Judge Cabranes). Nevertheless, the result reached by the court of appeals is inconsistent with a proper understanding of this Court's decisions in *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), and *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007). Moreover, further review is particularly warranted because the court of appeals' ruling creates a conflict with decisions of at least four other courts of appeals faced with similar facts, and its approach would largely eviscerate the important protections of the doctrine of qualified immunity in the circumstances in which those protections are most acutely needed.

a. The court of appeals relied on a handful of conclusory allegations as the purported basis for holding

petitioners potentially liable for alleged unlawful discrimination and conspiracy—through the acts of subordinate officials—to deprive respondent of his civil rights. Even at face value, those allegations do not show that respondent's right to relief against petitioners was anything more than speculative. As this Court stated in *Bell Atlantic*, to defeat a motion to dismiss, the allegations in a complaint must contain "more than labels and [legal] conclusions" and must "raise a reasonable expectation that discovery will reveal evidence" that the defendants engaged in unlawful conduct. 127 S. Ct. at 1965. Similarly, in *Crawford-El*, the Court contemplated that district courts will "protect[] the substance of the qualified immunity defense" by requiring plaintiffs to "'put forward specific, nonconclusory factual allegations' * * * in order to survive a prediscovery motion for dismissal or summary judgment." 523 U.S. at 598 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)). Respondent's allegations against petitioners do not meet those burdens.

Respondent alleges that petitioners "approved" a policy of holding suspects deemed to be "of high interest" to the September 11th investigation in highly restrictive conditions of confinement pending clearance by the FBI, App., *infra*, 168a (Compl. ¶ 69), but he does not claim that the policy was itself discriminatory. Rather, he claims that the policy was implemented in a discriminatory fashion by two lower-level FBI officials, who were actually responsible for determining which suspects were "of high interest" to the terrorism investigation. See *id.* at 164a-165a, 169a (Compl. ¶¶ 51, 76). Thus, respondent alleges only that "[i]n many cases," detainees were classified—by persons other than petitioners—as being "of high interest" because of their

race, religion, and national origin, "not because of any evidence of the detainees' involvement in supporting terrorist activity." *Id.* at 164a (Compl. ¶ 49). Respondent also alleges that, "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks * * * were immediately classified as 'of interest'" to the investigation. *Id.* at 165a (Compl. ¶ 52).

The underlying allegations do not support the conclusory allegations about petitioners' personal involvement and, if anything, they affirmatively suggest a lack of personal involvement. The complaint alleges that (1) respondents approved only of a general policy, App., *infra*, 168a (Compl. ¶ 69); (2) the general policy was not discriminatory on its face, but rather in application, *id.* at 164a (Compl. ¶¶ 48-49); and (3) other defendants made the individual determinations at issue, *id.* at 164a-165a (Compl. ¶¶ 50-51). Respondent does not allege that either petitioner participated in the classification decision, or that they knew which detainees were classified as being "of high interest," or even that they established the allegedly discriminatory criteria that were used by subordinate officials. Nor does respondent allege any communications between the individuals who allegedly made the classification at issue (Rolince and Maxwell) and petitioners, or that petitioners knew of any particular activities taken by the other defendants as to respondent.

Respondent also alleges that petitioners had supervisory authority over subordinate officials who implemented the confinement policy, as part of their ultimate responsibility for investigating and prosecuting violations of federal criminal law. See App., *infra*, 157a, 164a

(Compl. ¶¶ 10, 11, 47). As explained below (at pp. 26-29, *infra*), the mere fact of supervisory authority is not an adequate basis for holding petitioners personally liable for alleged wrongdoing committed by others, absent facts showing that they had actual knowledge of a substantial risk of wrongdoing and that their failure to take action was the proximate cause of respondent's alleged injuries. The allegations that petitioners had official authority over subordinates who were allegedly discriminatory in their selection of "high interest" detainees are thus fully consistent with lawful behavior on petitioners' part. See *Bell Atl. Corp.*, 127 S. Ct. at 1965-1966 (holding that a complaint must allege facts sufficient to make an inference of unlawful conduct plausible, and not merely possible, and that allegations that are fully consistent with lawful behavior do not "raise a right to relief above the speculative level").

The very language of the court of appeals' opinion underscores the extent to which it was premised on speculative inferences. The court simply assumed that, in light of the importance of the investigation into the September 11th attacks, there was a "likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies" for "high interest" suspects. App., *infra*, 62a; see also *id.* at 43a ("[I]t is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies."). But the requirement that the actual allegations of the complaint be plausible, rather than speculative, is not an invitation to engage in speculation con-

cerning matters that the plaintiff himself did not allege. And this case shows the hazards of such speculation. As the district court noted, the investigation was nothing short of "massive." *Id.* at 76a n.4. "Within 3 days [of September 11, 2001], more than *4,000 FBI Special Agents* and *3,000 support personnel* were assigned to work on the investigation," and "[b]y September 18, 2001, the FBI had received more than *96,000 leads* from the public." *Ibid.* (emphases added). Given the unprecedented size of the investigation, there is every reason to assume that the Attorney General and the Director of the FBI did not personally do more than—as respondent specifically alleges—approve a general policy of using highly restrictive confinement for any "high interest" detainee until it could be established that he was not connected with terrorist activities.

Finally, respondent makes a conclusory allegation that petitioners "knew of, condoned, and willfully and maliciously agreed" to subject him to unlawful discrimination. App., *infra*, 172a (Compl. ¶ 96). But that is simply a legal conclusion and it is black-letter law that a court ruling on a motion to dismiss is not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986). This Court reaffirmed and elaborated on that proposition in *Bell Atlantic*, explaining that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"; rather, a plaintiff's factual allegations must do more than create a suspicion of actionable wrongdoing. 127 S. Ct. at 1964-1965. Because the subsidiary factual allegations in the complaint in this case do not show that a right of recovery against petitioners is any-

thing more than speculative, the courts below should have granted their motion to dismiss.

b. The court of appeals invoked this Court's decisions in *Crawford-El* and *Swierkiewicz* in holding that the allegations against petitioners—in particular the unsupported and conclusory allegation that they "knew of, condoned, and willfully and maliciously agreed" to discrimination—were sufficient to defeat summary disposition. App., *infra*, 61a-62a. Those cases lend no weight to the conclusion that an allegation of culpable mens rea, unsubstantiated by any predicate facts about the conduct that is the alleged basis for liability, is enough to defeat summary disposition.

In both *Crawford-El* and *Swierkiewicz*, the complaints provided clear notice to the defendant of the conduct alleged to give rise to liability (*i.e.*, the who, what, and when of the alleged wrongdoing). In *Crawford-El*, the plaintiff prisoner alleged that the defendant corrections officer had deliberately misdelivered his box of personal belongings by asking his relative to pick them up rather than ship them to his next destination, and that she had done so in retaliation for the plaintiff's participation in unfavorable press reporting about the prison. 523 U.S. at 578-579. The plaintiff also alleged specific statements by the defendant herself that provided circumstantial evidence of her discriminatory motivation. *Id.* at 579 n.1. Similarly, in *Swierkiewicz*, the plaintiff alleged that he was demoted by his employer's Chief Executive Officer and that the bulk of his former duties were transferred to a younger employee; that the CEO later said he wanted to "energize" his department and appointed the younger and less-qualified employee to the plaintiff's prior position; and that, following his demotion, the plaintiff was isolated by his supervisor

and excluded from business decisions. 534 U.S. at 508. After outlining his grievances, the plaintiff was given the choice of resigning without a severance package and, when he refused to do so, was fired. See *id.* at 509; see also *id.* at 514 (noting that the complaint "detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination"). Thus, the only issue before this Court in both cases was the showing of discriminatory motive necessary to defeat summary disposition of the claims. See *Crawford-El*, 523 U.S. at 577-578; *Swierkiewicz*, 534 U.S. at 513-514; see also Fed. R. Civ. P. 9(b) (requiring that fraud or mistake must be pleaded with particularity but that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally").

Here, and in sharp contrast, respondent's allegations do not identify the specific conduct alleged to be the basis for petitioners' individual liability. He does not allege the *what* of liability (*i.e.*, any steps that the Attorney General or FBI Director took to approve, condone, or ratify the discriminatory selection of respondent as a "high interest" detainee). Respondent does not allege *when* this conduct took place, *who* was involved, or *where* it occurred. And respondent does not allege a factual basis for inferring that petitioners' allegedly culpable states of mind were the proximate cause of the allegedly discriminatory selection of respondent as a "high interest" detainee. The allegations against petitioners are therefore analogous to the hypothetical allegation of an unlawful agreement in *Bell Atlantic*, which this Court held could not satisfy Rule 8's notice requirements because it made no mention of any "specific time, place, or persons involved in the alleged conspiracies."

127 S. Ct. at 1970 n.10; see also *id.* at 1964 (holding that allegations in the complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)).

c. The decision of the court of appeals is not only erroneous, but also in conflict with decisions of at least four other courts of appeals holding that conclusory allegations that high-level government officials are culpable for wrongdoing by subordinate officials or the agency itself are inadequate to defeat a motion to dismiss.

Thus, in *Marrero-Gutierrez* v. *Molina*, 491 F.3d 1 (2007), the First Circuit addressed allegations that government supervisors had "performed, fostered, and encouraged the continuous persecution, harassment, transfers, reprisals and demotions" of the plaintiff "because of" her political affiliation, "and in reprisal for defending [her] rights in frivolous processes commenced against [her]." *Gutiérrez* v. *Molina*, 447 F. Supp. 2d 168, 175 (D.P.R. 2006). The court of appeals held that the plaintiff's allegations were insufficient to defeat a motion to dismiss on the pleadings, because they failed to "set forth any sort of causal connection between her demotion and the political animus that she alleges prompted it." 491 F.3d at 9-10. Although "such a connection" was concededly "one among a myriad of possible inferences" from the alleged facts, the court found that insufficient under *Bell Atlantic* because "it would be speculative to draw the forbidden inference from the range of possibilities." *Id.* at 10.

Similarly, in *Evancho* v. *Fisher*, 423 F.3d 347 (2005), the Third Circuit held that an allegation that the plaintiff's allegedly unlawful transfer "was carried out by underlings reporting directly to the [state] attorney gen-

eral and/or by the attorney general himself" did not suffice to show the attorney general's personal involvement in the challenged decision. *Id.* at 354. Emphasizing that liability could not be based on *respondeat superior*, the court refused to infer that the attorney general was involved in the challenged transfer simply because he had supervisory authority over the plaintiff. *Id.* at 353-354. The court also noted the difficulty that the attorney general would have in framing an answer to the complaint, given the lack of any allegation of a specific act by him relating to the transfer. See *id.* at 354; see also *ibid.* (explaining that court was not required to credit the "bald assertion" that the attorney general had carried out the plaintiff's transfer in deciding motion to dismiss).

In *Nuclear Transport & Storage, Inc.* v. *United States*, 890 F.2d 1348 (1989), cert. denied, 494 U.S. 1079 (1990), the Sixth Circuit affirmed the dismissal of *Bivens* claims brought against the Secretary of Energy and two other officials of the Department of Energy. The court held that allegations that the individual defendants "acted to implement, approve, carry out, and otherwise facilitate" allegedly unlawful conduct by the Department were insufficient to defeat a motion to dismiss. See *id.* at 1355 (quoting the complaint); see also *Nuclear Transp. & Storage, Inc.* v. *United States*, 703 F. Supp. 660, 667-668 (E.D. Tenn. 1988), aff'd, 890 F.2d 1348 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990). As the Sixth Circuit noted, if the plaintiff's conclusory allegations against the individual defendants "were sufficient to state a claim, any suit against a federal agency could

be turned into a *Bivens* action by adding a claim for damages against the agency head." 890 F.2d at 1355.[3]

And in *Gonzalez* v. *Reno*, 325 F.3d 1228 (2003), the Eleventh Circuit held that conclusory allegations that federal agents executing an arrest warrant for Elian Gonzalez "acted under the personal direction of" Attorney General Janet Reno, INS Commissioner Doris Meissner, and Deputy Attorney General Eric Holder, and with those officials' "knowledge, agreement, approval, and acquiescence," were inadequate to survive a motion to dismiss. *Id.* at 1235. The Eleventh Circuit noted that the plaintiff had failed to allege any facts supporting these conclusory allegations, and held that it would be unreasonable to infer without additional support that the high-level officials had directed unconstitutional conduct. *Id.* at 1235-1236. Particularly in light of "the presumption of legitimacy accorded to official conduct," the reasonable inference from the facts alleged "is that the supervisory defendants ordered the execution of valid search and arrest warrants with the expectation that the agents on the scene would execute them in a lawful manner." *Ibid.*; see also *Dalrymple* v. *Reno*, 334 F.3d 991, 996-997 (11th Cir. 2003) (holding, in companion

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[3] Although *Nuclear Transport* was decided at a time when the Sixth Circuit applied a heightened pleading standard to civil-rights claims against government officials, the standard that the Sixth Circuit applied in that case is comparable to the standard articulated by this Court in decisions like *Bell Atlantic* and *Crawford-El*. See *Nuclear Transport*, 890 F.2d at 1355 (complaint "must contain more than 'mere conclusory allegations of unconstitutional conduct'" by government officials) (quoting *Chapman* v. *City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986)). In addition, the Sixth Circuit has subsequently described as "well-settled" the principle that a plaintiff must "allege that a specific defendant performed a specific act that suffices to state a claim." *Kesterson* v. *Moritsugu*, No. 96-5898, 1998 WL 321008, at *4 (June 3, 1998).

case, that allegations that Attorney General Reno "knew and intended" that subordinate officers carrying out a federal raid would subject bystanders to excessive force were insufficient to defeat a motion to dismiss), cert. denied, 541 U.S. 935 (2004).

d. By permitting unsubstantiated allegations of culpable knowledge to be the basis for discovery against high-level government officials, the court of appeals has substantially undermined the effectiveness of the doctrine of qualified immunity. This Court has long acknowledged the "social costs" of allowing *Bivens* claims against government officials, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). The type of claims in this case—challenging as culpable the mens rea of high-level government officials—raises particularly serious problems in this regard, because such claims inevitably result in discovery into the subjective motivations and state of mind of senior officials. As the Court recognized in *Harlow*, such inquiries are "peculiarly disruptive of effective government" and "frequently could implicate separation-of-powers concerns." *Id.* at 817 & n.28. Moreover, the nature of the responsibilities of high-ranking officials means that, if conclusory allegations suffice, they could be subject to a high volume of disruptive suits that could divert the officials' attention from their important responsibilities.

Although this Court has rejected a heightened pleading standard for claims alleging improper motive that are subject to a qualified-immunity defense, it has nevertheless emphasized that a district court should "protect[] the substance of the qualified immunity defense"

by, *inter alia*, "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal." *Crawford-El*, 523 U.S. at 597-598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)); see also *Bell Atl. Corp.*, 127 S. Ct. at 1973 n.14 (noting that "we do not apply any heightened pleading standard," but holding that the plaintiff failed to state a claim under a proper understanding of Rule 8) (internal quotation marks omitted).

By failing to require that level of specificity in this case, the court of appeals has effectively precluded petitioners from arguing that, in the circumstances in which they acted, their conduct was objectively reasonable and thus shielded by qualified immunity.[4] As a consequence, the decision below has, as Judge Cabranes observed, created a "blueprint" that can now be used by others "claiming to be aggrieved by national security programs and policies of the federal government" to "require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." App., *infra*, 69a-70a. For some plaintiffs, the opportunity to distract the attention of high-ranking officials in carrying out policies with which they disagree may itself be a strong incentive for filing suit.

The availability of such a blueprint is especially troubling in the national-security context—not only because

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[4] The specific context in which government officials act is always relevant to the qualified-immunity analysis. See, *e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) ("The relevant, dispositive inquiry * * * is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.") (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)).

"there surely is a national interest" in having government officials perform such "sensitive duties with decisiveness and without potentially ruinous hesitation," but also because "[t]he passions aroused by matters of national security * * * and the high profile of the Cabinet officers with functions in that area make them 'easily identifiable target[s] for suits for civil damages'" or even for "vexatious and politically motivated litigation." *Mitchell*, 472 U.S. at 541-542 (Stevens, J., concurring in judgment) (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982)). Cf. *Wilson* v. *Libby*, 498 F. Supp. 2d 74, 96 (D.D.C. 2007) (refusing to infer a remedy under *Bivens* in part because of "the risks incurred by discovery into issues of national security"). Indeed, this case focuses on the actions of the highest-ranking Department of Justice officials in the immediate aftermath of the deadliest attack on American soil in the Nation's history. It is unlikely that the demands placed on those officials by such litigation will escape the notice of the individuals who occupy those positions in the event of any future national-security crisis. Cf. *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.) (to deny qualified immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties"), cert. denied, 339 U.S. 949 (1950).

The fact that this case is at the dismissal stage does not alleviate the need for this Court's review. The qualified-immunity doctrine provides not merely immunity from liability but "*immunity from suit*." *Mitchell*, 472 U.S. at 526. And this Court has "repeatedly * * * stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 502 U.S. at 227 (citing cases). As the Court has explained,

that proactive approach is warranted to "weed out suits * * * without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert*, 500 U.S. at 232; see also *Harlow*, 457 U.S. at 818 (until the "threshold immunity issue is resolved, discovery should not be allowed"). As Judge Cabranes observed, allowing suits, such as this, against high-ranking officials predicated only on conclusory allegations of general knowledge of the alleged actions of lower-level officials to proceed past the dismissal stage could "require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." App., *infra*, at 70a. Such "discovery would not only result in significant cost but would also deplete the time and effectiveness of current officials and the personal resources of former officials." *Id.* at 70a n.1.[5]

This Court's review is warranted to protect high-level officials from the burden of defending against unsubstantiated claims premised on little more than a conclusory allegation of a culpable state of mind.

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[5] The panel decision stressed that the district court should take care in allowing discovery against petitioners. App., *infra*, 67a. But, as this Court emphasized in *Bell Atlantic*, "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." 127 S. Ct. at 1967 (citation omitted). Rather, the court's responsibility is to "tak[e] care to require allegations that reach the [requisite] level" in the first place before allowing any discovery to ensue. *Ibid.*

II. Certiorari Is Warranted To Consider Whether High-Ranking Officials May Be Held Liable In A *Bivens* Action Based On A Constructive Notice Theory

This Court's review is also warranted to consider whether high-level government officials may be held personally liable for wrongdoing of which they lacked actual knowledge on the theory that their official responsibilities gave them constructive notice of the actions of subordinate officials. The Second Circuit's refusal to dismiss the claims against petitioners was predicated on its holding that the Attorney General and FBI Director could be held liable for inadequate supervision of subordinates, even without any allegations that could support a finding of actual knowledge of a risk of unconstitutional conduct by others. That holding is inconsistent with the general presumption of regularity that applies to the actions of government officials, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and with this Court's decisions. It also implicates a clear circuit split on the important question whether actual knowledge is necessary for supervisory liability.

a. In holding that the allegations against petitioners were adequate to subject them to discovery, the court of appeals emphasized that, as agency heads, petitioners had ultimate responsibility over the policies and practices challenged in the lawsuit, and specifically that the FBI's arrest and detention of thousands of Arab Muslim men in the course of investigating the September 11th attacks took place "under the direction of [petitioner] Mueller." App., *infra*, 62a. Although, as discussed, the general policy alleged by respondent was not discriminatory on its face, and although the court of appeals recognized that other officials—and not petitioners—were in

fact responsible for the classification of respondent as a "high interest" detainee, the court reasoned that petitioners nevertheless could be held personally responsible "for the actions of their subordinates under the standards of supervisory liability." *Ibid.*

In the Second Circuit, those standards permit a supervisor to be held personally liable under Section 1983 or *Bivens* based not only on the supervisor's actual knowledge, but also on merely constructive knowledge, of a risk of wrongdoing by subordinate officials. See App., *infra*, 14a (holding that supervisor may be liable for, *inter alia*, gross negligence in supervising subordinates who commit constitutional violation); accord, *e.g.*, *Poe* v. *Leonard*, 282 F.3d 123, 141-142 (2d Cir. 2002); *Black* v. *Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996); *Meriwether* v. *Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989); *McKinnon* v. *Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978).[6]

b. The court of appeals' endorsement of supervisory liability on a theory of negligent supervision is contrary to the approach this Court has adopted in related contexts. In Section 1983 suits—the "analog" to *Bivens* for state actions, see *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006)—the Court has foreclosed the imposition of Section 1983 liability on individual government officials on the basis that they had "constructive notice" of wrongdoing committed by third parties. In *Rizzo* v.

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[6] In light of established circuit precedent, petitioners did not brief the question of actual knowledge in the court of appeals. But petitioners "argue[d] that [respondent] failed to allege their personal involvement in any discrimination," and the court rejected that argument on the express assumption that they could have "personal responsibility for the actions of their subordinates" even in the absence of actual knowledge. App., *infra*, 62a.

Goode, 423 U.S. 362 (1976), the Court reversed a grant of injunctive relief under Section 1983 against the mayor, the city manager, the police commissioner, and other police supervisors in Philadelphia. It concluded that there could be no supervisory liability under Section 1983 when "unconstitutional exercises of police power" had been committed by individual police officers rather than their supervisors and "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisors]—express or otherwise—showing their authorization or approval of such misconduct." *Id.* at 371, 377. Although administrators may be liable when they deny rights "by their *own* conduct," that was not the case in *Rizzo*, because "the responsible authorities had played no affirmative part" in violating constitutional rights. *Id.* at 377.

The general restraint that this Court traditionally exercises in interpreting the scope of the *Bivens* cause of action (see *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007)) at a minimum calls for adopting a standard of secondary liability that is at least as rigorous as the one that this Court has long applied in the Section 1983 context. And, indeed, in *Farmer* v. *Brennan*, 511 U.S. 825 (1994), the Court held that a supervisory-level prison official can be held liable for dangerous prison conditions alleged to violate the Eighth Amendment only if the supervisor "knows of and disregards an excessive risk to inmate health or safety" (*i.e.*, is subjectively aware of the risk to the prisoner and chooses to disregard it). *Id.* at 837-838. In adopting that requirement of *subjective* knowledge as the predicate for "deliberate indifference," the Court distinguished individual defendants from corporate mu-

nicipalities, for which an objective standard of knowledge is more appropriate. See *id.* at 841-842.

The Court has followed a similar approach in Section 1983 actions against municipalities. There, the Court has held that liability attaches only "when it can be fairly said that the city itself is the wrongdoer," *Collins* v. *City of Harker Heights*, 503 U.S. 115, 122 (1992), and not based on a theory of *respondeat superior* or vicarious liability. See *City of Canton* v. *Harris*, 489 U.S. 378, 386-387 (1989). Where a plaintiff seeks to hold a municipality liable for constitutional torts committed by its agents, the plaintiff must "demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Board of the County Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997); see also *id.* at 405 (explaining that "rigorous standards of culpability and causation must be applied"). Liability may not be imposed based on "simple or even heightened negligence," but instead requires a showing that the municipality itself manifested "deliberate indifference to the risk that a violation of a particular constitutional or statutory right" might occur. *Id.* at 407, 411. The plaintiff must also establish "a direct causal link" between the municipality's culpable conduct "and the alleged constitutional deprivation." *Harris*, 489 U.S. at 385.

No more lenient standard than the deliberate-indifference standard should apply where a plaintiff seeks to hold a supervisory official such as the Attorney General or the Director of the FBI personally liable under *Bivens* for unconstitutional conduct allegedly committed by a subordinate employee. The rationale for imposing liability is the same in both instances, as is the rule that liability must be predicated on the defendant's own cul-

pable conduct rather than vicarious liability or *respondeat superior*.

As applied to the allegations in this case, the standard articulated in *Farmer* for "deliberate indifference" would preclude liability unless petitioners had actual knowledge of the discriminatory selection of suspects as "of high interest" (or of a significant risk of discriminatory selections). See *Farmer*, 511 U.S. at 837-838; *Brown*, 520 U.S. at 414. But the factual allegations in respondent's complaint could not establish that petitioners knew of any serious risk that subordinates were engaged in unlawful discrimination, much less knew of the alleged unlawful conduct against respondent himself. Furthermore, respondent's factual allegations do not show any causal relationship between petitioners' own conduct and respondent's designation as a suspect "of high interest." Absent such allegations, respondent's right to relief was purely speculative.

c. The court of appeals' holding implicates a clear and well-developed split among the circuits on the question whether a government official may be held personally liable based on constructive notice of actual wrongdoing or the risk of wrongdoing by subordinates, or must instead have actual notice of the wrongdoing or risk of wrongdoing.

As one commentator has noted, "[t]he Second Circuit's test for supervisory liability is the most expansive and the least reconcilable with *Rizzo*." Michael S. Bogren, *Municipal Liability Under § 1983, in Sword & Shield Revisited* 215, 255 (Mary Massaron Ross ed., 1998) (Bogren). But other circuits—the First, Fourth, and Eighth Circuits—have also deviated from *Rizzo*'s requirement that a supervisor be liable only when he or she has some direct responsibility for the alleged consti-

tutional violation. See *ibid.*; *Rodriguez-Garcia* v. *Municipality of Caguas*, 495 F.3d 1, 10 (1st Cir. 2007) (holding that a plaintiff may establish supervisor liability by showing "that the official had actual or constructive notice of the constitutional violation"); *Carter* v. *Morris*, 164 F.3d 215, 221 (4th Cir. 1999) (stating that supervisor liability requires a showing of "actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff") (internal quotation marks omitted); *Hall* v. *Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993) ("[P]roof of actual knowledge is not an absolute prerequisite for imposing supervisory liability. We have consistently held that reckless disregard on the part of a supervisor will suffice to impose liability.") (internal quotation marks and citations omitted), cert. denied, 510 U.S. 1047 (1994).

By contrast, the Third Circuit does not impose liability on a supervisor unless the supervisor actually knew of the subordinate's conduct and either approved of it or acquiesced in it. See *Baker* v. *Monroe Twp.*, 50 F.3d 1186, 1194 (1995); *id.* at 1194 n.5 (noting "that other circuits have developed broader standards for supervisory liability under section 1983"); *id.* at 1200-1201 (Alito, J., concurring and dissenting) (stating test and concluding that actual knowledge of, and acquiescence in, an unlawful search could not be inferred under the circumstances). The Tenth Circuit has expressly followed the Third Circuit. See, *e.g.*, *Woodward* v. *City of Worland*, 977 F.2d 1392, 1400 (1992) ("We are persuaded that the proper articulation of the test for supervisory liability under section 1983 is that set forth by the Third Circuit * * * where * * * supervisor liability requires 'allega-

tions of personal direction or of actual knowledge and acquiescence.'") (internal citation and quotation marks omitted), cert. denied, 509 U.S. 923 (1993). The Seventh Circuit has similarly rejected liability for a supervisor who negligently fails to detect and prevent subordinate misconduct, see *Gossmeyer* v. *McDonald*, 128 F.3d 481, 495 (1997), and it has required plaintiffs to establish that supervisors were "personally involved or acquiesced in the alleged constitutional violation," *Kelly* v. *Municipal Courts*, 97 F.3d 902, 909 (1996).

As then-Judge Roberts explained for the D.C. Circuit, when "supervisors cannot be shown to have the requisite direct responsibility or to have given their authorization or approval of * * * misconduct," then "the effort to hold them personally liable fades into *respondeat superior* or vicarious liability, clearly barred under Section 1983." *International Action Ctr.* v. *United States*, 365 F.3d 20, 27 (2004) (internal quotation marks omitted). The principles of restraint that this Court applies in interpreting the scope of the *Bivens* cause of action compel the same conclusion here. And that is especially true in the context of this case, involving claims against high-ranking government officials arising out of the alleged conduct of inferior officials during an unprecedented national-security crisis.

d. The question of the level of knowledge needed to hold a supervisory official liable for wrongdoing committed by subordinate officials is of substantial importance and warrants clarification by this Court. Cf. Bogren 257-258 ("The divergence of the circuits on the issue of supervisory liability leads to the inescapable conclusion that the Supreme Court will have to revisit this issue. In the meantime, * * * there is no bright-line rule on which a practitioner can rely."). By permitting supervi-

sory officials to be held liable based on a theory of constructive notice, the court of appeals has inappropriately expanded the inferred *Bivens* remedy to encompass something approaching *respondeat superior* liability. That result poses a significant threat to high-level government officials of crippling personal liability, and accordingly exacerbates the practical harms of a *Bivens* claim against supervisory officials. Cf. *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888) ("Competent persons could not be found to fill [supervisory] positions * * * if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."). Moreover, a high-ranking official without actual notice of wrongdoing by subordinates will necessarily have little control over where the wrongdoing occurs or where suit is brought. The divergence of authority among the circuits is therefore patently unfair to high-ranking officials.

In this case, the impact of the Second Circuit's broad conception of supervisory liability under *Bivens*, coupled with its lenient pleading standard, is startling. As Judge Cabranes observed, under the court of appeals' decision, the former Attorney General and current FBI Director "may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when [petitioners] were trying to cope with a national and international security emergency unprecedented in the history of the American Republic." App., *infra*, 69a. What is more, the court's decision establishes a "blueprint" for "other plaintiffs claiming to

be aggrieved by national security programs and policies of the federal government * * * to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery." *Id.* at 69a-70a. The court of appeals decision producing that unsettling result warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

BARBARA L. HERWIG
ROBERT M. LOEB
SHARON SWINGLE
Attorneys

FEBRUARY 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 05-5768-CV (L), 05-5844-CV (con), 05-6379-CV (con), 05-6352-CV (con), 05-6386-CV (con), 05-6358-CV (con), 05-6388-CV (con)

JAVAID IQBAL, PLAINTIFF-APPELLEE

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL COOKSEY, FORMER ASSISTANT DIRECTOR FOR CORRECTIONAL PROGRAMS OF THE BUREAU OF PRISONS, JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, DAVID RARDIN, FORMER DIRECTOR OF THE NORTHEAST REGION OF THE BUREAU OF PRISONS, MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION, KATHLEEN HAWK SAWYER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS, KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION, DEFENDANTS-APPELLANTS

Heard: Oct. 4, 2006
Decided: June 14, 2007

Before: NEWMAN, CABRANES, and SACK, Circuit Judges.

JON O. NEWMAN, Circuit Judge.

These interlocutory appeals present several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11. Several current and former government officials from the Department of Justice, the Federal Bureau of Investigation ("FBI"), and the Bureau of Prisons ("BOP") appeal from the September 27, 2005, Order of the District Court for the Eastern District of New York (John Gleeson, District Judge) denying in part their motions to dismiss on the ground of qualified immunity. *See Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) ("*Dist. Ct. op.*"). Plaintiff-Appellee Javaid Iqbal alleges that the Defendants-Appellants took a series of unconstitutional actions against him in connection with his confinement under harsh conditions at the Metropolitan Detention Center ("MDC") in Brooklyn, after separation from the general prison population. We conclude that the defense of qualified immunity, to the extent rejected by the District Court, cannot be sustained as to any Defendants at this preliminary stage of the litigation except as to the claim of violation of procedural due process rights, and we therefore affirm in part, reverse in part, and remand.

Background

Parties. Iqbal is a Muslim Pakistani currently residing in Pakistan. Iqbal's co-plaintiff was Ehad Elmaghraby, a Muslim Egyptian. After Judge Gleeson's ruling on the motions to dismiss, the United States settled Elmaghraby's claims by payment of $300,000.

Four groups of Defendants have filed appeals from Judge Gleeson's order. The first group consists of former Attorney General John Ashcroft and current FBI Director Robert Mueller. The second group consists of Michael Rolince, former Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and Kenneth Maxwell, former Assistant Special Agent in Charge of the FBI's New York Field Office (the "FBI Defendants"). The third group consists of former BOP officials: Kathleen Hawk Sawyer, former BOP Director; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; and Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons (the "BOP Defendants"). The fourth appeal was filed by Dennis Hasty, former MDC Warden. Other Defendants include Michael Zenk, MDC Warden at the time the lawsuit was filed, other MDC staff, and the United States.

Factual allegations. The complaint alleges the following facts, which are assumed to be true for purposes of the pending appeals, as we are required to do in reviewing a ruling on a motion to dismiss. *See Hill v. City of New York*, 45 F.3d 653, 657 (2d Cir. 1995). The Plaintiff was arrested by agents of the FBI and the Immigra-

tion and Naturalization Service on November 2, 2001.[1] Following his arrest, he was detained in the MDC's general prison population until January 8, 2002, when he was removed from the general prison population and assigned to a special section of the MDC known as the Administrative Maximum Special Housing Unit ("ADMAX SHU"), where he remained until he was reassigned to the general prison population at the end of July 2002. On this appeal, we consider only claims concerning the Plaintiff's separation from the general prison population and confinement thereafter in the ADMAX SHU. We do not consider the legality of his arrest or his initial detention in the MDC.

The complaint further alleges that in the months after 9/11, the FBI arrested and detained thousands of Arab Muslim men as part of its investigation into the events of 9/11. The fact of their detention, its duration, and the conditions of confinement depended on whether those arrested were classified as "of high interest." Many of these men, including the Plaintiff, were classified as "of high interest" solely because of their race,[2] religion, and national origin and not because of any in-

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[1] The complaint does not identify the charges on which Iqbal was arrested, but Judge Gleeson's opinion states that he was charged with conspiracy to defraud the United States and fraud with identification. *Dist. Ct. op.* at *1 n.1.

[2] Iqbal is a Muslim and a Pakistani, but not an Arab. Nevertheless, his claim is fairly to be understood as alleging unlawful treatment based on his ethnicity, even if not technically on a racial classification. And his allegations of what was done to Arab Muslims are fairly understood to mean that unlawful actions were taken against him because officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab.

volvement in terrorism. In the New York City area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was investigating a 9/11 lead were classified as "of high interest." The FBI Defendants were responsible for making these classifications for detainees arrested in the New York City area, including the Plaintiff.

The complaint further alleges that Ashcroft and Mueller approved a policy of holding detainees "of high interest" in highly restrictive conditions until they were "cleared" by the FBI. In early October, BOP Defendant Cooksey, with the knowledge of BOP Defendant Sawyer, directed that all detainees "of high interest" be held in the most restrictive conditions possible. FBI officials were aware that the BOP was relying on this classification to hold detainees in restrictive conditions.

The complaint further alleges that soon after 9/11, the MDC created within the MDC an ADMAX SHU, the BOP's most restrictive type of confinement, to house the detainees "of high interest." The procedures for handling ADMAX SHU detainees were developed by MDC staff, at the request of Defendant Hasty. ADMAX SHU detainees were permitted to leave their cells only one hour each day, and all legal and social interactions were non-contact. Movement outside their cells required handcuffs and leg irons and four-officer escorts. Movement inside their cells was monitored by video cameras. For many weeks, the detainees were subject to a communications blackout.

The complaint further alleges that the MDC did not conduct any review of the detainees' segregation in the ADMAX SHU. Instead, the detainees remained in the ADMAX SHU until the FBI approved their release to

the general population. As a result, numerous detainees were held in the ADMAX SHU for extended periods of time even though there was no evidence linking them to terrorism.

The complaint further alleges that the Plaintiff was transferred to the ADMAX SHU on January 8, 2002. He was kept in solitary confinement. Until March, the lights in his cell were left on almost 24 hours a day, and MDC staff deliberately turned on air conditioning during the winter and heating during the summer. MDC staff left the Plaintiff in the open-air recreation area for hours when it was raining and then turned on the air conditioner when he returned to his cell. Whenever the Plaintiff was removed from his cell, he was handcuffed and shackled. The Plaintiff was not provided with adequate food and lost 40 pounds while in custody. MDC staff called him, among other things, a "terrorist" and a "Muslim killer."

The complaint further alleges that the Plaintiff was brutally beaten by MDC guards on two occasions: upon his transfer to the ADMAX SHU in January 2002 and again in March. Following the March beating, the Plaintiff was denied medical care for two weeks even though he was in excruciating pain. He was also subjected to daily strip and body-cavity searches. The March beating was prompted by the Plaintiff's protestations to a fourth consecutive strip and body-cavity search in the same room. MDC staff interfered with the Plaintiff's prayers, routinely confiscated his Koran, and refused to permit him to participate in Friday prayer services. They also interfered with the Plaintiff's communications with his defense attorney, for example, by disconnecting the phone if the Plaintiff complained about his conditions of

confinement and delaying his receipt of legal mail for up to two months.

The Plaintiff pled guilty on April 22, 2002, and was sentenced on September 17, 2002. He was released from the ADMAX SHU at the end of July 2002, after pleading guilty but before sentencing. Judge Gleeson considered the Plaintiff to be a pretrial detainee throughout his entire time in the ADMAX SHU. *Dist. Ct. op.* at *15 n.14. The Plaintiff was released from the MDC on January 15, 2003, and thereafter was removed to Pakistan (a fact not in the complaint but undisputed).

Litigation in the District Court. The Plaintiff (and his co-plaintiff) commenced this action in May 2004. Their complaint asserted twenty-one causes of action, including both statutory claims and constitutional tort claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). The causes of action, and the Defendants against whom they were asserted, are set forth in the margin.[3]

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[3] The claims, in the order set forth in the complaint, are:

1. Fifth Amendment substantive due process claim based on the conditions of confinement: Hasty and MDC staff.

2. Fifth Amendment procedural due process claim based on confinement in the ADMAX SHU: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

3-4. Fifth and Eighth Amendments excessive force claims: Hasty and MDC staff.

5. Sixth Amendment interference with right to counsel claim: Hasty and MDC staff.

Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, Hasty, the MDC Warden, and an MDC

6-7. Fifth and Eighth Amendments denial of medical treatment claims: MDC staff (not at issue on this appeal).

8. Eighth Amendment conditions of confinement claim: Hasty and MDC staff.

9. Fourth Amendment unreasonable search claim based on strip and body-cavity searches: BOP Defendant Sawyer (but not other BOP Defendants), Hasty, and MDC staff.

10. First Amendment claim based on interference with religious practice: Hasty and MDC staff.

11. First Amendment claim based on religious discrimination: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

12. Fifth Amendment race-based equal protection claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

13. Religious Freedom Restoration Act ("RFRA") claim based on conditions of confinement: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

14-15. RFRA claims based on interference with religious practice and excessive force: Hasty and MDC staff.

16-17. 42 U.S.C. § 1985(3) claims for conspiracy to deprive Plaintiff of equal protection on the grounds of religion, race, and national origin: Ashcroft and Mueller, BOP Defendants, Hasty, and MDC staff.

18-20. Federal Tort Claims Act ("FTCA") claims for assault and battery, negligent denial of medical treatment, intentional infliction of emotional distress: United States.

21. Alien Tort Claims Act ("ATCA") claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

medical assistant[4] filed motions to dismiss on the grounds that (1) a *Bivens* action was precluded by "special factors," (2) they were protected by qualified immunity, (3) the supervisory defendants were not alleged to have sufficient personal involvement, and (4) Ashcroft, Mueller, the FBI Defendants, and the BOP Defendants were not subject to personal jurisdiction in New York. In addition, the United States moved to be substituted as the defendant on the ATCA claim (Count 21) and for dismissal of that claim.

With a few exceptions, Judge Gleeson denied the motions to dismiss. He first rejected Ashcroft's argument that "special factors," namely the post-9/11 context, precluded a *Bivens* action in this case. *See Dist. Ct. op.* at *14. Judge Gleeson then turned to the substance of the Plaintiff's *Bivens* claims. He denied Hasty's motion to dismiss the conditions of confinement claims (Counts One and Eight), concluding that the Plaintiff had adequately alleged (1) illegitimate reasons for the conditions of his confinement and (2) Hasty's personal involvement. *See id.* at *15-*17. He also found adequate allegations of Hasty's personal involvement in the claims of excessive force (Counts Three and Four), interference with the Plaintiff's right to counsel (Count Five), unreasonable strip searches (Count Nine), and interference with the Plaintiff's exercise of religion (Count Ten). *See id.* at *22, *27, *28. However, he found the allegations insufficient to support the personal involvement of BOP Defendant Sawyer in the unreasonable strip searches and dismissed this claim against her. *See id.* at *27.

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[4] Zenk, the MDC Warden at the time the lawsuit was filed, and the MDC medical assistant are not appealing Judge Gleeson's ruling.

With respect to the procedural due process claim (Count Two), Judge Gleeson found that the Plaintiff had alleged both a deprivation of a liberty interest that involved "atypical and significant" hardships compared to the conditions in the general prison population and the absence of any due process protections, that the Plaintiff's right was clearly established, and that he could not assess the objective reasonableness of the Defendants' actions as a matter of law at this stage of the litigation. *See id.* at *18-*20. He also found that the Plaintiff had adequately alleged the personal involvement of all the Defendants, observing that "the post-September 11 context provide[d] support for [the P]laintiffs' assertions that [the D]efendants were involved in creating and/or implementing the detention policy under which [the P]laintiffs were confined without due process." *See id.* at *20-*21. Finally, with respect to the procedural due process claim, he limited the first stage of discovery to the issue of the Defendants' personal involvement in the alleged denial of due process. *See id.* at *21.

With respect to the Plaintiff's *Bivens* claims of race and religious discrimination (Counts 11 and 12), Judge Gleeson ruled that the Plaintiff's allegations that he was confined in significantly harsher conditions solely because of his race and religion were sufficient to state a cause of action. *See id.* at *29. He also concluded that the Plaintiff had adequately alleged the personal involvement of Ashcroft and Mueller, the FBI Defendants, and Hasty. *See id.* However, because the Plaintiff had not alleged that the BOP Defendants were involved in the challenged classification in any way, Judge Gleeson concluded that the Plaintiff had not alleged the personal involvement of the BOP Defendants, and he dismissed these claims against them. *See id.*

Turning to the Plaintiff's statutory claims, Judge Gleeson dismissed the RFRA claims against all the Defendants, concluding that they were entitled to qualified immunity because it was not clearly established that RFRA applied to federal government officials. *See id.* at *30-*31. He also dismissed the ATCA claim after first having substituted the United States for the individual defendants. *See id.* at *34-*35. Finally, he denied the motions to dismiss the section 1985(3) conspiracy claims, rejecting the Defendants' arguments that it was not clearly established that section 1985 applied to federal officers and concluding that the Plaintiff had adequately alleged the Defendants' personal involvement, except with respect to the allegation that the BOP Defendants had conspired to subject the Plaintiff to unreasonable strip searches. *See id.* at *32-*33.

Discussion

The Defendants appeal from the District Court's order denying their motions to dismiss on the ground of qualified immunity. Their arguments with respect to qualified immunity fall into several broad categories: (1) the Plaintiff's allegations do not allege the violation of a clearly established right, (2) do not allege sufficient personal involvement of the Defendants in the challenged actions, (3) are too conclusory to overcome a qualified immunity defense, and (4) the Defendants' actions were objectively reasonable. Permeating the Defendants' assertion of a qualified immunity defense is the contention that, however the defense might be adjudicated in normal circumstances, the immediate aftermath of the 9/11 attack created a context in which the defense must be assessed differently and, from their standpoint, favorably.

In addition, Ashcroft, Mueller, and FBI Defendant Rolince seek review of the denial of their motion to dismiss for lack of personal jurisdiction, arguing that the issue of personal jurisdiction is available for review on this interlocutory appeal because the issue is inextricably intertwined with that of qualified immunity.

Because many of the Defendants' grounds for asserting an immunity defense overlap with respect to several of the Plaintiff's allegations, it will be convenient to consider separately each of the Plaintiff's causes of action with respect to the one or more Defendants against whom it is asserted, rather than consider separately the claims asserted against each Defendant. Before turning to each of the Plaintiff's allegations, we first consider the legal standards that apply to nearly all of the Plaintiff's claims and to most of the grounds on which the Defendants assert their qualified immunity defense.

I. General Principles of Qualified Immunity

(a) *Standard of review.* When a district court denies qualified immunity on a Rule 12(b)(6) motion to dismiss, "we review the district court's denial *de novo*, accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs' favor." *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 250 (2d Cir. 2001).

(b) *Appealability.* A district court's denial of qualified immunity is appealable as a collateral order if it turns on an issue of law. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Thus, a defendant may appeal a district court's ruling denying qualified immunity when, if a plaintiff's allegations are assumed to be true, the only question is whether the alleged conduct violated a clearly established

right. *See Locurto v. Safir,* 264 F.3d 154, 163 (2d Cir. 2001).

(c) *The qualified immunity defense.* Qualified immunity is an immunity from suit and not just a defense to liability. *See Saucier v. Katz,* 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The first step in a qualified immunity inquiry is to determine whether the alleged facts demonstrate that a defendant violated a constitutional right. *See id.* at 201, 121 S. Ct. 2151; *see also Scott v. Harris,* —U.S.—, 127 S. Ct. 1769, 1774 & n.4, 167 L. Ed. 2d 686 (2007). If the allegations show that a defendant violated a constitutional right, the next step is to determine whether that right was clearly established at the time of the challenged action-that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *See Saucier,* 533 U.S. at 202, 121 S. Ct. 2151. A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law. *See Johnson,* 239 F.3d at 250.

In determining whether a right was clearly established, the court must assess whether "the contours of the right [were] sufficiently clear in the context of the alleged violation such that a reasonable official would understand that what he [was] doing violate[d] that right." *Id.* at 250-51 (internal quotation marks omitted). To that end, the court should consider what a reasonable officer in the defendant's position would have known about the lawfulness of his conduct, "not what a lawyer would learn or intuit from researching case law." *Id.* at 251 (internal quotation marks omitted). Furthermore,

the court need not identify "legal precedent addressing an identical factual scenario" to conclude that the right is clearly established. *Id.*; *see also Tellier v. Fields*, 280 F.3d 69, 84 (2d Cir. 2000) (noting that a law is "clearly established" so long as a ruling on the issue is "clearly foreshadow[ed]" by this Circuit's decisions).

(d) *Personal involvement.* Many of the Defendants claim qualified immunity on the ground that the Plaintiff has failed to allege their personal involvement in the challenged actions. All of the appealing Defendants are supervisory officials. The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (discussing section 1983 liability).

Although a lack of personal involvement may be grounds for dismissing a claim on the merits (a ruling that would not be subject to an interlocutory appeal), such a lack is also relevant to a defense of qualified immunity because it goes to the question of whether a defendant's actions violated a clearly established right. *See McCullough v. Wyandanch Union Free School District*, 187 F.3d 272, 280 (2d Cir. 1999) ("Where there is a total absence of evidence of [a violation], there is no basis on which to conclude that the defendant seeking qualified immunity violated clearly established law." (internal quotation marks omitted)). "[O]ur task is to

consider whether, as a matter of law, the factual allegations and all reasonable inferences therefrom are insufficient to establish the required showing of personal involvement." *Johnson*, 239 F.3d at 255.

(e) *Pleading requirements.* The parties dispute the extent to which a plaintiff must plead specific facts to overcome a defense of qualified immunity at the motion-to-dismiss stage. Although most of the Defendants disclaim requiring the Plaintiff to meet a heightened pleading standard, beyond the requirement of *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *see* Fed. R. Civ. P. 8(a)(2), all the Defendants make the somewhat similar argument that "conclusory allegations" will not suffice to withstand a qualified immunity defense, especially with respect to allegations of supervisory involvement, racial and/or religious animus, or conspiracy. BOP Defendant Cooksey explicitly urges us to adopt a heightened pleading standard in *Bivens* actions.

The pleading standard to overcome a qualified immunity defense appears to be an unsettled question in this Circuit. Four Supreme Court opinions provide guidance, although the guidance they provide is not readily harmonized. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993), the Court rejected a heightened pleading standard in a civil rights action alleging municipal liability, applying instead only the traditional requirement of "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 168, 113 S. Ct. 1160 (quoting Fed. R. Civ.

P. 8(a)(2)). In reaching this conclusion, the Court distinguished between municipalities' immunity from *respondeat superior* liability and government officials' qualified immunity from suit. *See id.* at 166, 113 S. Ct. 1160. Arguably, this distinction could permit requiring a plaintiff to satisfy a heightened pleading standard of a cause of action in order to overcome a government official's defense of qualified immunity. However, the Court's opinion in *Leatherman* suggests that heightened pleading standards are never permissible except when authorized by Rule 9(b) of the Federal Rules of Civil Procedure. *See id.* at 168, 113 S. Ct. 1160 (noting that Rule 9(b) "do[es] not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983"). Indeed, the Court observed that, in the absence of amendment to Rules 8 or 9, the courts could rely only on control of discovery and summary judgment to "weed out unmeritorious claims." *Id.* at 168-69

A more pertinent precedent is *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), which concerned the adequacy of pleading a Title VII complaint. The Court rejected what had been this Circuit's rule requiring employment discrimination plaintiffs to allege facts constituting a *prima facie* case of employment discrimination. *See id.* at 515, 122 S. Ct. 992. The Court again emphasized that the judicially imposed heightened pleading standard conflicted with Rule 8(a) and that a heightened pleading standard could be attained only "by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* (internal quotation marks omitted).

Leatherman and especially *Swierkiewicz*—with their insistence that courts cannot impose heightened plead-

ing standards in the absence of statutory authorization—indicate that a court cannot impose a heightened pleading standard in *Bivens* (or other civil rights) actions against individual officials, a precept we have heeded since the Supreme Court's decision in *Swierkiewicz*. *See, e.g., Phillip v. University of Rochester*, 316 F.3d 291, 298-99 (2d Cir. 2003) (general allegation of racial animus); *Phelps v. Kapnolas*, 308 F.3d 180, 186-87 (2d Cir. 2002) (general allegation of knowledge).

However, a third Supreme Court case, decided between *Leatherman* and *Swierkiewicz*, cryptically suggests that, in some circumstances, a court could require "specific, nonconclusory factual allegations" at the pleading stage in claims against government officials. In *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), the D.C. Circuit had recognized a heightened burden of proof in cases against government officials alleging unconstitutional motive. *See id.* at 582-83, 118 S. Ct. 1584. The Court observed that the D.C. Circuit had adopted the heightened standard in an attempt "to address a potentially serious problem: Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Id.* at 584-85, 118 S. Ct. 1584 (internal quotation marks omitted). Although the Supreme Court recognized this problem, it rejected the heightened standard of proof.

The Court held that the D.C. Circuit's rule was not compelled by either the holding or the reasoning of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In *Harlow*, the Court had stated

that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18, 102 S. Ct. 2727. However, as the Court explained in *Crawford-El*, this statement merely concerned a plaintiff's attempt to overcome a legitimate qualified immunity defense by alleging malicious intent; this holding was irrelevant to a plaintiff's burden in alleging a constitutional violation of which improper motive is an essential element. *See* 523 U.S. at 588-89, 118 S. Ct. 1584. Neither did *Harlow*'s reasoning require a heightened burden of proof: the Court observed that there existed other mechanisms for protecting officials from unmeritorious actions, such as the requirement that the officials' conduct violate clearly established law, the need to prove causation, and procedural protections. *See id.* at 590-93, 118 S. Ct. 1584.

The Court acknowledged that the usual pleading standard would sometimes not preclude at least limited discovery to amplify general allegations. The Court observed that *Harlow* only "sought to protect officials from the costs of 'broad-reaching' discovery" and that limited discovery is sometimes necessary to adjudicate a qualified immunity defense. *See id.* at 593 n.14, 118 S. Ct. 584. The Court concluded by observing that "broad discretion" in the discovery process is more "useful and equitable" than categorical rules such as that of the D.C. Circuit. *See id.* at 601.

What *Crawford-El* gave civil rights plaintiffs with respect to traditional notice pleading, however, it might have modified by permitting some post-complaint detailing of a claim. In discussing the procedural mechanisms available to judges in civil rights actions, at least those

alleging wrongful motive, the Court observed that, before permitting discovery, a court could require a plaintiff to "put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598, 118 S. Ct. 1584 (internal quotation marks omitted). Perhaps significantly, the Court quoted the phrase "put forward specific, nonconclusory factual allegations" from Justice Kennedy's concurring opinion in *Siegert v. Gilley,* 500 U.S. 226, 111 S. Ct. 789, 114 L. Ed. 2d 277 (1991), in which he had explicitly advocated a heightened pleading standard for civil rights actions requiring a showing of malice. *See id.* at 235-36, 111 S. Ct. 1789 ("There is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it.").

The First Circuit has remarked that "[w]hatever window of opportunity [it] thought remained open after *Crawford-El* has been slammed shut by the Supreme Court's subsequent decision in *Swierkiewicz.*" *Educadores Puertorriqueños en Acción v. Hernandez,* 367 F.3d 61, 65 (1st Cir. 2004). Most Circuits appear to have rejected a heightened pleading standard. *See Doe v. Cassel,* 403 F.3d 986, 988-89 & n.3 (8th Cir. 2005) (collecting cases); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1125 (9th Cir. 2002) (same).

Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly,* —U.S.—, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). If we were to consider only a

narrow view of the holding of that decision, we would not make any adjustment in our view of the applicable pleading standard. *Bell Atlantic* held that an allegation of parallel conduct by competitors, without more, does not suffice to plead an antitrust violation under 15 U.S.C. § 1. *See id.* at 1961. The Court required, in addition, "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965. However, the Court's explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), was decided half a century ago. The nature and extent of that alteration is not clear because the Court's explanation contains several, not entirely consistent, signals, which we consider (not necessarily in the order set forth in the Court's opinion).

Some of these signals point toward a new and heightened pleading standard. First, the Court explicitly disavowed the oft-quoted statement in *Conley* of "'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Bell Atlantic*, 127 S. Ct. at 1968 (quoting *Conley*, 355 U.S. at 45-46, 78 S. Ct. 99). *Bell Atlantic* asserted that this "no set of facts" language "has earned its retirement" and "is best forgotten." *Id.* at 1969

Second, the Court, using a variety of phrases, indicated that more than notice of a claim is needed to allege a section 1 violation based on competitors' parallel conduct. For example, the Court required "enough factual matter (taken as true) to suggest that an agreement was

made," *id.* at 1965; "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *id.*; "facts that are suggestive enough to render a § 1 conspiracy plausible," *id.*; "allegations of parallel conduct . . . placed in a context that raises a suggestion of a preceding agreement," *id.* at 1966; "allegations plausibly suggesting (not merely consistent with) agreement," *id.*; a "plain statement" (as specified in Rule 8(a)(2)) with "enough heft" to show entitlement to relief, *id.*; and "enough facts to state a claim to relief that is plausible on its face," *id.* at 1974, and also stated that the line "between the factually neutral and the factually suggestive . . . must be crossed to enter the realm of plausible liability," *id.* at 1966 n.5, and that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible," *id.* at 1973 n.14.

Third, the Court discounted the ability of "'careful case management,'" "to weed[ ] out early in the discovery process" "a claim just shy of a plausible entitlement." *Id.* at 1967 (quoting *id.* at 1975 (Stevens, J., dissenting)).

Fourth, the Court encapsulated its various formulations of what is required into what it labeled "the plausibility standard." *Id.* at 1968. Indeed, the Court used the word "plausibility" or an adjectival or adverbial form of the word fifteen times (not counting quotations).

On the other hand, some of the Court's linguistic signals point away from a heightened pleading standard and suggest that whatever the Court is requiring in *Bell Atlantic* might be limited to, or at least applied most rigorously in, the context of either all section 1 allegations or perhaps only those section 1 allegations relying on

competitors' parallel conduct. First, the Court explicitly disclaimed that it was "requir[ing] heightened fact pleading of specifics," *id.* at 1974, and emphasized the continued viability of *Swierkiewicz*, *see id.* at 1973-74, which had rejected a heightened pleading standard. *See also Erickson v. Pardus*, —U.S.—, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (citing *Bell Atlantic*'s citation of *Swierkiewicz*).

Second, although the Court faulted the plaintiffs' complaint for alleging "merely legal conclusions" of conspiracy, *Bell Atlantic*, 127 S. Ct. at 1970, it explicitly noted with approval Form 9 of the Federal Civil Rules, Complaint for Negligence, which, with respect to the ground of liability, alleges only that the defendant "negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway," Fed. R. Civ. P. App. Form 9. *See Bell Atlantic*, 127 S. Ct. at 1970 n.10. The Court noted that Form 9 specifies the particular highway the plaintiff was crossing and the date and time of the accident, *see id.*, but took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent, *i.e.*, driving too fast, crossing the center line, running a traffic light or stop sign, or even generally failing to maintain a proper lookout. The adequacy of a generalized allegation of negligence in the approved Form 9 seems to weigh heavily against reading *Bell Atlantic* to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred.

Third, the Court placed heavy emphasis on the "sprawling, costly, and hugely time-consuming" discov-

ery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, *see id.* at 1967 n.6, and expressed concern that such discovery "will push cost-conscious defendants to settle even anemic cases," *id.* at 1967. These concerns provide some basis for believing that whatever adjustment in pleading standards results from *Bell Atlantic* is limited to cases where massive discovery is likely to create unacceptable settlement pressures.

Fourth, although the Court expressed doubts about the ability of district courts to *"weed[] out"* through case management in the discovery process "a claim just shy of a plausible entitlement to relief," *id.* (emphasis added), the Court did not disclaim its prior statement that "federal courts and litigants must rely on summary judgment and control of discovery to *weed out* unmeritorious claims sooner rather than later." *Leatherman*, 507 U.S. at 168-69, 113 S. Ct. 1160 (emphasis added).[5] Leaving *Leatherman* and *Crawford-El* undisturbed (compared to the explicit disavowal of the "no set of facts" language of *Conley*) further suggests that *Bell Atlantic*, or at least its full force, is limited to the antitrust context.

Fifth, just two weeks after issuing its opinion in *Bell Atlantic*, the Court cited it for the traditional proposition that "[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]"; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson*, 127

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[5] There is no possibility that the "weed out" language of *Leatherman* was overlooked; it was called to the Court's attention in Justice Stevens's dissent. *See Bell Atlantic*, 127 S. Ct. at 1982.

S. Ct. at 2200 (quoting *Bell Atlantic*'s quotation from *Conley*) (omission in original).

These conflicting signals create some uncertainty as to the intended scope of the Court's decision.[6] We are reluctant to assume that all of the language of *Bell Atlantic* applies only to section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases.[7] Some of the language relating generally to Rule 8 pleading standards seems to be so integral to the rationale of the Court's parallel conduct holding as to constitute a necessary part of that holding. *See* Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1257 (2006) ("The distinction [between holding and dictum] requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment.").

After careful consideration of the Court's opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a

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[6] The parties, not surprisingly, view *Bell Atlantic* entirely differently. Defendant Hasty characterizes the Supreme Court's decision as a "sea change" in the pleading standard of Rule 8, *see* Letter from Michael L. Martinez, counsel for Defendant Hasty, to the Acting Clerk of this Court (May 25, 2007); the Plaintiff emphasizes the antitrust holding of the decision, *see* Letter from Alexander A. Reinert, counsel for Plaintiff Iqbal, to the Acting Clerk of this Court (May 22, 2007).

[7] For example, it would be cavalier to believe that the Court's rejection of the "no set of facts" language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts (according to a Westlaw search), applies only to section 1 antitrust claims.

flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*. We will say more about this approach as we apply it below to some of the Plaintiff's specific allegations.

Notwithstanding what we understand to be the essential message of *Bell Atlantic*, we acknowledge that we see some merit in the argument in favor of a heightened pleading standard in this case for two reasons. First, qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation. In this respect, the factors favoring a heightened pleading standard to overcome a qualified immunity defense are distinguishable from the purely prudential and policy-driven factors that the Supreme Court found inadequate to justify a heightened pleading standard in the Title VII context. *See Swierkiewicz*, 534 U.S. at 514-15, 122 S. Ct. 992.

Second, some of the allegations in the Plaintiff's complaint, although not entirely conclusory, suggest that some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement. Therefore, allowing some of the Plaintiff's claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent.

Nevertheless, although *Swierkiewicz* was decided in the context of Title VII, we are mindful of the Supreme Court's statement in that decision that heightened pleading requirements "must be obtained by the process

of amending the Federal Rules, and not by judicial interpretation." *Id.* at 515, 122 S. Ct. 992 (internal quotation marks omitted). Absent any indication from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in *Bell Atlantic*, reinforced by the reversal of the Tenth Circuit's use of a heightened pleading standard in *Erickson*, we conclude that a heightened pleading rule may not be imposed. However, in order to survive a motion to dismiss under the plausibility standard of *Bell Atlantic*, a conclusory allegation concerning some elements of a plaintiff's claims might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement. *See* Fed. R. Civ. P. 12(e). In addition, even though a complaint survives a motion to dismiss, a district court, while mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation, may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct. In a case such as this where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been

completed and has demonstrated the need for discovery higher up the ranks. If discovery directed to current or former senior officials becomes warranted, a district court might also consider making all such discovery subject to prior court approval.

We note that Rule 8(a)'s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but "*must* exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El*, 523 U.S. at 597-98, 118 S. Ct. 1584 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that certain of the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place. *See Harlow*, 457 U.S. at 821, 102 S. Ct. 2727 (Brennan, J., concurring) ("[S]ummary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred."). We give these matters additional consideration below with respect to particular claims.

(f) *The post-9/11 context.* Several Defendants contend that even if the Plaintiff's complaint would survive

a motion to dismiss in the face of a qualified immunity defense under normal circumstances, the post-9/11 context requires a different outcome. This argument is advanced on three fronts. First, some Defendants contend that the Government was entitled to take certain actions that might not have been lawful before 9/11 because the Government's interests assumed special weight in the post-9/11 context. Second, some Defendants contend that, even if the law was clearly established as to the existence of a right claimed to have been violated, it was not clearly established in the extraordinary circumstances of the 9/11 attack and its aftermath. Third, some Defendants contend that the post-9/11 context renders their actions objectively reasonable, an argument we do not reach in view of our disposition of their second contention.

We fully recognize the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attack. We also recognize that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times. *See Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 425-26, 54 S. Ct. 231, 78 L. Ed. 413 (1934) ("While emergency does not create power, emergency may furnish the occasion for the exercise of power."). But most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.

With some rights, for example, the right to be free from unreasonable searches, the existence of exigent circumstances might justify governmental action that would not otherwise be permitted. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) (exigent circumstances permitted warrantless entry into home). But, as we discuss below, *see* Part VI, the exigent circumstances of the post-9/11 context do not diminish the Plaintiff's right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches. This and other rights, such as the right to be free from use of excessive force and not to be subjected to ethnic or religious discrimination, were all clearly established prior to 9/11, and they remained clearly established even in the aftermath of that horrific event. To whatever extent exigent circumstances might affect the lawfulness of the Defendants' actions or might have justified an objectively reasonable belief that their actions did not violate clearly established law, we consider the argument in connection with a particular claim.

With these general principles in mind, we turn to the Plaintiff's specific claims.

II. Procedural Due Process

The Plaintiff alleges that Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, and Hasty adopted a policy under which he was deprived of a liberty interest without any of the procedural protections required by due process of law. His allegation of the deprivation of a liberty interest, even while lawfully confined without bail on criminal charges, is based on his placement in solitary confinement, where he was subjected to needlessly harsh restrictions that were atypical

and significant when compared to those in the rest of the MDC population. The Defendants contend that (1) the Plaintiff did not allege that the confinement was punitive; (2) no procedural due process right was violated because the Plaintiff did not have a liberty interest in avoiding extended confinement in the ADMAX SHU and, even if he did, he received all the process that was due; (3) even if the Plaintiff's procedural due process right was violated, the contours of this right were not clearly established at the time of the events in question; (4) the Defendants' actions were objectively reasonable in the post-9/11 context; and (5) the Plaintiff has failed to allege personal involvement.

We are required by the Supreme Court's decision in *Saucier* to assess these arguments within a two-part framework, asking first whether the alleged facts show a violation of a constitutional right, *see Saucier*, 533 U.S. at 201, 121 S. Ct. 2151, and, if so, "whether the right was clearly established . . . in light of the specific context of the case," *see id.* The first, second, and fifth of the Defendants' arguments bear on the initial issue of whether a violation has been alleged; the third argument-whether the right was clearly established-is precisely the second issue under *Saucier*; and the fourth argument is often a further component of a qualified immunity defense because even if the law was clearly established, it might have been objectively reasonable, on the facts of a particular case, for a defendant to believe that the actions taken did not violate that established law, *see Johnson*, 239 F.3d at 250.

(a) Has a Violation of a Procedural Due Process Right Been Adequately Pleaded?

In assessing the adequacy of the Plaintiff's pleading of a procedural due process violation we first consider the basic question of whether the Plaintiff has pleaded the existence of a liberty interest and entitlement to procedures that were not provided and then consider the Defendants' arguments that punitive intent and personal involvement were not adequately pleaded.

(i) *The Plaintiff's procedural due process right.* In concluding that the Plaintiff had a protected liberty interest, Judge Gleeson relied on this Court's decision in *Tellier v. Fields*, 280 F.3d 69 (2d Cir. 2000). *See Dist. Ct. op.* at *17-*18. In *Tellier*, a federal inmate allegedly was placed in administrative detention in the SHU for more than 500 days without being informed of the reasons for his placement or receiving any hearings. *See* 280 F.3d at 74. The regulations governing administrative segregation, 28 C.F.R. § 541.22, entitle inmates to "an administrative detention order detailing the reasons for placing an inmate in administrative detention . . . provided institutional security is not compromised thereby." 28 C.F.R. § 541.22(b). Moreover, the regulations require a Segregation Review Officer to "hold a hearing and formally review the status of each inmate who spends seven continuous days in administrative detention, and thereafter . . . hold a hearing and review these cases formally at least every 30 days." *Id.* § 541.22(c)(1). The regulations specifically provide that administrative detention "is to be used only for short periods of time except . . . where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns." *Id.*

In assessing whether a prisoner had a protected liberty interest in avoiding administrative segregation, *Tellier* looked to *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), in which the Supreme Court held that state-created liberty interests of prisoners were limited to freedom from restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 483-84, 115 S. Ct. 2293. Since *Sandin*, the rule in this Circuit has been that a prisoner has a protected liberty interest "'only if the deprivation . . . is atypical and significant and the state has created the liberty interest by statute or regulation.'" *Tellier*, 280 F.3d at 80 (quoting *Sealey v. Giltner*, 116 F.3d 47, 52 (2d Cir. 1997)) (omission in original); *see also Palmer v. Richards*, 364 F.3d 60, 64 & n.2 (2d Cir. 2004).

Numerous cases in this Circuit have discussed the "atypical and significant hardship" prong of *Sandin*. Relevant factors include both the conditions of segregation and its duration. *See Palmer*, 364 F.3d at 64. Segregation of longer than 305 days in standard SHU conditions is sufficiently atypical to require procedural due process protection under *Sandin*. *See id.* at 65 (citing *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000)). When confinement is of an intermediate duration—between 101 and 305 days—"'development of a detailed record' of the conditions of the confinement relative to ordinary prison conditions is required." *Id.* at 64-65 (quoting *Colon*, 215 F.3d at 232).

Applying these standards, *Tellier* first observed that the prisoner had alleged confinement of more than 500 days "under conditions that differ markedly from those in the general population," finding this sufficient to al-

lege "atypical and significant" hardships. 280 F.3d at 80. Turning to the language of the regulations, the Court agreed that because the initial decision to place a prisoner in administrative detention is a discretionary one, the plaintiff did not have a "protected liberty interest that is violated when the Warden removes him or her from the general population." *Id.* at 82. However, the Court found, the regulations constrain the warden's discretion in maintaining a prisoner in detention and the procedures "are designed to ensure that a prisoner is kept in SHU for no longer than is necessary." *Id.* at 82-83. Accordingly, the Court concluded that section 541.22 "creates a protectable liberty interest when an official's failure to adhere to the [regulation] results in an atypical, significant deprivation." *Id.* at 83 (internal quotation marks omitted).

Relying on *Tellier*, Judge Gleeson concluded that the Plaintiff had a clearly established protectable liberty interest in avoiding continued detention in the ADMAX SHU. *See Dist. Ct. op.* at *18. On appeal, the Defendants contend that *Tellier* is no longer good law in light of the Supreme Court's recent opinion in *Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). In *Wilkinson*, the Supreme Court considered *Sandin*'s application to segregation in Ohio's Supermax facility. Inmates in the Supermax facility were detained in solitary confinement indefinitely, they remained in their cells 23 hours a day, the lights were turned on constantly, they could not go outside for recreation, and they were limited to non-contact visits. *See id.* at 214-15, 125 S. Ct. 2384. The Court confirmed *Sandin*'s holding that "a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set

forth in *Sandin*," *id.* at 222, 125 S. Ct. 2384, but observed that "the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life," *id.* at 223, 125 S. Ct. 2384 (internal quotation marks omitted). The Court recognized that the courts of appeals had struggled to identify a baseline for determining what constitutes an atypical and significant hardship, but it concluded that confinement in the Supermax facility "imposes an atypical and significant hardship under any plausible baseline." *Id.* Having found that the prisoner had a protected liberty interest, the Court concluded that Ohio's "informal, nonadversary procedures" were sufficient to satisfy due process requirements. *Id.* at 228-29, 125 S. Ct. 2384.

The Defendants argue that *Wilkinson* abrogates *Tellier* or that it at least renders the relevant standard unclear because it instructs courts to consider the nature of the conditions, not the requirements of the regulations. We disagree for two reasons. First, while *Wilkinson* instructs courts to focus on the nature of the conditions, it nonetheless explains that the "liberty interest in avoiding particular conditions of confinement . . . arise[s] from state policies or regulations." *Id.* at 222, 125 S. Ct. 2384. Following *Tellier*, Judge Gleeson looked to the duration and conditions of confinement, as instructed by *Wilkinson*. *See Dist. Ct. op.* at *18.

Second, and more significantly, for at least half (if not all) of the Plaintiff's confinement in the ADMAX SHU, he was a pretrial detainee, not a convicted pris-

oner.[8] This Court has said that *Sandin* does not apply to pretrial detainees and that, accordingly, pretrial detainees need not show that an imposed restraint imposes atypical and significant hardships to state deprivation of a liberty interest protected by procedural due process. *See Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001) ("*Benjamin I*"). In *Benjamin I*, this Court affirmed the district court's ruling that the imposition of painful physical restraints during the movement of pretrial detainees required "reasonable after-the-fact procedural protections to ensure that such restrictions on liberty [would] be terminated reasonably soon if they [had] no justification." *Id.* at 188.

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[8] The Defendants do not seriously contest Judge Gleeson's characterization of the Plaintiff as a pretrial detainee, although Ashcroft and Mueller briefly contend that his private interest in avoiding detention in the ADMAX SHU after he pled guilty should be evaluated "within the context of the prison system," *i.e.*, under Eighth Amendment standards. The Plaintiff argues that he should be treated as a pretrial detainee until he was sentenced, citing *Fuentes v. Wagner*, 206 F.3d 335, 341 (3d Cir. 2000).

The circuits are divided as to whether to treat convicted, but unsentenced, inmates as pretrial detainees. *Compare id.* (treated as pretrial detainee) *with Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000) (treated as prisoner), *Whitnack v. Douglas County*, 16 F.3d 954, 956-57 (8th Cir. 1994) (same), *and Berry v. City of Muskogee*, 900 F.2d 1489, 1493 (10th Cir. 1990) (same). Because none of the Defendants seriously challenges Judge Gleeson's characterization of the Plaintiff as a pretrial detainee throughout his entire confinement in the ADMAX SHU, we will refer to him as a pretrial detainee, a status that plainly applies during the several months of confinement prior to the Plaintiff's plea. We do not consider the question of whether convicted, but unsentenced, inmates are pretrial detainees under the Supreme Court's jurisprudence establishing criteria for evaluating constitutional limits on conditions of confinement.

In sum, *Wilkinson* does not affect the validity of Judge Gleeson's ruling that the Plaintiff had a protected liberty interest because (1) he considered the Plaintiff's allegations of atypical and significant hardships and (2) the *Wilkinson* and *Sandin* analysis does not apply to the interval of the Plaintiff's pretrial detention. Under this Court's case law, the Plaintiff's confinement of more than six months fell in the intermediate range, thereby requiring inquiry into the conditions of his confinement, which he sufficiently alleges to have been severe. Even under *Wilkinson*, the conditions under which the Plaintiff alleges that he was confined—solitary confinement, repeated strip and body-cavity searches, beatings, exposure to excessive heat and cold, very limited exercise, and almost constant lighting—as well as the initially indefinite duration of confinement could be found to constitute atypical and significant hardships. *See* 545 U.S. at 223-24, 125 S. Ct. 2384. The Plaintiff has alleged a protected liberty interest in avoiding more than six months' detention in the ADMAX SHU, especially in light of his status as a pretrial detainee.

The Defendants also dispute the violation of a procedural due process right by arguing that, even if the Plaintiff had a protected liberty interest in avoiding extended detention in the ADMAX SHU, he received all the process that was due by virtue of the FBI's review. This argument is unavailing at this preliminary stage of the litigation. In *Wilkinson*, the Supreme Court applied the familiar balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine whether the plaintiff received adequate procedural protections. *See* 545 U.S. at 224-25, 125 S. Ct. 2384. Under the second prong of this test, the Court observed that inmates received "notice of the factual basis leading

to consideration for OSP placement and a fair opportunity for rebuttal," stating that "these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Id.* at 225-26, 125 S. Ct. 2384. After weighing all the relevant factors, the Court found that "[w]here the inquiry draws more on the experience of prison administrators, and where the State's interest implicates the safety of other inmates and prison personnel, . . . informal, nonadversary procedures" were sufficient. *Id.* at 228-29, 125 S. Ct. 2384. In the pending case, the Plaintiff alleges that he did not even receive notice of the factual grounds on which he was being detained in the ADMAX SHU nor did he have any opportunity for rebuttal.

We recognize that in the post-9/11 context the third *Mathews* factor—the gravity of the Government's interest—is appropriately accorded more weight than would otherwise be warranted. It might be that the combination of (1) the Plaintiff's interest in avoiding confinement under harsh conditions, (2) the risk of an erroneous determination of the need for such confinement, and (3) the Government's interest, accorded added weight in the post-9/11 context, would, on balance, lead to the conclusion that the Government need not have given the Plaintiff notice and a chance for rebuttal *before* placing him in the ADMAX SHU. However, once it became clear that the Plaintiff was going to be confined in the ADMAX SHU for an extended period of time, some process was required. We cannot say in the absence of a developed factual record whether the FBI's clearance procedure comported with the requirements of the Due Process Clause as interpreted in *Mathews* and subsequent cases. The sparse record thus far developed provides no indication as to what security-related

steps the Defendants were taking that might justify prolonged confinement. Nor does that record indicate in what respect providing the Plaintiff with some notice of the basis for his separation in the ADMAX SHU and affording some opportunity for rebuttal would have impaired national security interests or legitimate penological interests of the Government. The Government has not as yet had an opportunity to refute the Plaintiff's allegation that there was no evidence connecting him to terrorism. Accordingly, we cannot say whether the Government's national security interests rendered the clearance procedure sufficient to satisfy procedural due process requirements or whether more traditional procedural protections were required. Nevertheless, because we are required at this stage of the litigation to accept all of the Plaintiff's allegations as true and draw all reasonable inferences in his favor, we cannot say that the Plaintiff has failed to plead a viable claim under the procedural component of the Due Process Clause. Judge Gleeson dismissed the Plaintiff's procedural due process claim with respect to the initial confinement in the ADMAX SHU, *Dist. Ct. op.* at *17 n.18, but properly ruled that the Plaintiff had stated a procedural due process claim with respect to his continued confinement, *see id.* at *18-*19.

(ii) *Punitive intent.* Ashcroft, Mueller, and Hasty, citing *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), contend that the Plaintiff has not stated a claim that the confinement in the ADMAX SHU violated his procedural due process rights because he has not alleged that the confinement was punitive. Preliminarily, we note that the complaint alleges that the Defendants designed a policy under which the Plaintiff was "arbitrarily designated to be confined in the

ADMAX SHU" and that "[k]eeping Plaintiff[ ] in isolation . . . amounted to the willful, malicious, and unnecessary infliction of pain and suffering." This is sufficient to allege that the confinement was punitive in nature.

More fundamentally, however, we deem unsupportable the Defendants' premise that the Plaintiff's procedural due process claim requires an allegation of punitive intent. Defendants Ashcroft and Mueller cite *Wolfish*, 441 U.S. at 535, 99 S. Ct. 1861, for the proposition that "in evaluating the constitutionality of conditions or restrictions of pretrial detention, the proper inquiry under the Due Process Clause is whether the conditions 'amount to punishment of the detainee.'" However, *Wolfish* did not involve a claim that inadequate procedures had been used to impose challenged conditions of confinement. The claim there was that the challenged conditions of confinement, being punitive, could not be imposed on pretrial detainees at all because they had not been convicted. Although the Court did not consider the challenged conditions punitive, it ruled that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* This ruling implements the substantive component of the Due Process Clause.[9]

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[9] Since *Wolfish* prohibited punishment prior to the process of adjudicating guilt, it could be considered a decision vindicating a procedural claim. However, as the Supreme Court's decisions in *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), and *Sandin*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418, make clear, when the Court is truly considering a claim that restrictions were imposed within a prison without adequate procedures, it is focusing precisely on the procedural requirements of the Due Process Clause, and not what in reality is the substantive component that was at issue in *Wolfish*. *See*

By contrast, the relevant line of authority for the Plaintiff's procedural due process claim begins with *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), and continues through *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), and *Sandin*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418. *Wolff* outlined fairly extensive procedures that must be observed before a prisoner's liberty interest in retaining good time credits could be impaired because of disciplinary violations. 418 U.S. at 563-72, 94 S. Ct. 2963. *Helms* required only notice of charges and an opportunity to rebut in order to place a prisoner in administrative segregation pending an investigation of misconduct charges. 459 U.S. at 476, 103 S. Ct. 864. *Sandin* modified *Helms* by making the existence of a prisoner's liberty interest turn primarily on the atypical nature of the challenged conditions of confinement, 515 U.S. at 483-87, 115 S. Ct. 2293, but did not alter the basic requirement that where a prisoner's liberty interest exists, its impairment requires some procedural protections.

The Plaintiff's liberty interest, based primarily on a federal regulation, is entitled to some procedural protection regardless of punitive intent. To the extent that the interest derives directly from the Due Process Clause (and hence requires procedural protection only when punishment is imposed, *see Wolfish*, 441 U.S. at 535, 99 S. Ct. 1861), the harsh conditions set forth in the com-

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Block v. Rutherford, 468 U.S. 576, 591 & n.12, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) (applying *Wolfish* to pretrial detainees' substantive due process claim and distinguishing it from a procedural due process claim).

plaint adequately meet the criteria for punishment, *see Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), whether or not such conditions were imposed with punitive intent.

(iii) *Lack of personal involvement.* Defendants Ashcroft and Mueller contend that the Plaintiff has not adequately alleged their personal involvement in the denial of procedural due process because the continued detention decision was made by FBI subordinates. Applying the standards applicable to personal involvement outlined above, we reject this claim at this stage of the litigation. Ashcroft and Mueller are alleged to have condoned the policy under which the Plaintiff was held in harsh conditions of confinement until "cleared" by the FBI. Since the complaint adequately alleges, for purposes of a motion to dismiss, that procedural due process required some procedures beyond FBI clearance, the allegation of condoning the policy of holding the Plaintiff in the ADMAX SHU until cleared suffices, at the pleading stage, to defeat dismissal for lack of personal involvement.

At the other end of the leadership chain, Defendant Hasty asserts his lack of personal involvement because the continued detention decision was made far above his level of responsibility. But this defense also cannot prevail at this stage of the litigation. *Cf. Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003) ("Plausible instructions from a superior . . . support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (*e.g.*[,] . . . exigent circumstances)." (internal quotation marks omitted)). Hasty is

alleged to have known of the continued detention in the ADMAX SHU and the absence of procedural protections for the Plaintiff. Whether his conduct as a subordinate was objectively reasonable under all the circumstances is an issue distinct from the adequacy of the pleading of personal involvement.

Between these extremes in the official hierarchy, the lack of adequate allegations of personal knowledge of, or involvement in, the Plaintiff's continued detention is also asserted by the FBI Defendants and the BOP Defendants. However, the complaint at least implicitly alleges the knowledge of the FBI Defendants by stating that they "failed to approve post-September 11 detainees' release to general population." With respect to the BOP Defendants, the complaint alleges that BOP Defendant Cooksey "directed that all detainees 'of high interest' be confined in the most restrictive conditions possible until cleared by the FBI," that BOP Defendant Sawyer approved this policy, and that BOP Defendant Rardin, along with others, designed the policy of arbitrary confinement in the ADMAX SHU. The FBI Defendants also dispute their personal involvement in a procedural due process violation by arguing that they could not reasonably be expected to know about the BOP regulations. However, some factual development of this claim would have to precede its determination. Moreover, even absent the FBI Defendants' knowledge of the BOP regulation, the complaint can support the inference that the FBI Defendants understood that their alleged role in the clearance procedure was linked to a detainee's release to the general population. This

It is arguable that, under the plausibility standard of *Bell Atlantic*, some subsidiary facts must be alleged to plead adequately that Ashcroft and Mueller condoned the Plaintiff's continued confinement in the ADMAX SHU, that Hasty had knowledge of that confinement, or that the mid-level Defendants knew the relationship between their clearance procedure and the Plaintiff's release to the general population. However, all of the Plaintiff's allegations respecting the personal involvement of these Defendants are entirely plausible, without allegations of additional subsidiary facts. This is clearly so with respect to Hasty and the mid-level Defendants. Even as to Ashcroft and Mueller, it is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies. Sustaining the adequacy of a pleading of personal involvement in these circumstances runs no risk that every prisoner complaining of a denial of rights while in federal custody anywhere in the United States can survive a motion to dismiss simply by alleging that the Attorney General knew of or condoned the alleged violation. And, like the Form 9 complaint approved in *Bell Atlantic*, Iqbal's complaint informs all of the Defendants of the time frame and place of the alleged violations.

(b) Was the Plaintiff's Right to Procedural Due Process Clearly Established?

Although we conclude that the Plaintiff has adequately pleaded a violation of a procedural due process right, we also conclude that in this case "officers of rea-

sonable competence could [have] disagree[d]," *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986), whether their conduct violated a clearly established procedural due process right. Accordingly, the Plaintiff's right to additional procedures was not clearly established with the level of specificity that is required to defeat a qualified immunity defense. *See Brosseau v. Haugen*, 543 U.S. 194, 199-200, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).

Several factors combine to create this lack of clarity in prior case law. First, some uncertainty exists in determining when administrative segregation procedures are required even in the ordinary criminal context. Our case law would require an officer in the Defendants' situation to consider various factors including the length of the Plaintiff's confinement, the extent to which the conditions of confinement were atypical, the text of relevant BOP regulations, and the Plaintiff's status as a pretrial detainee. *See, e.g., Tellier*, 280 F.3d at 79-83. As noted above, no single factor is dispositive in this case, which concerns administrative segregation of approximately six months. Although the harshness of the conditions alleged weigh in favor of requiring procedural protections, an officer could reasonably note that the Plaintiff's six-month continued confinement was comparable to the duration of confinements in cases that we characterized in *Tellier* as involving "relatively brief periods of confinement." *See id.* at 85.

Second, uncertainty in existing case law is heightened by the fact that, even on the facts alleged in the complaint, which specified that the "of high interest" designation pertained to the Government's post-9/11 terrorism investigation, the investigation leading to the

Plaintiff's separation from the general prison population could be reasonably understood by all of the Defendants to relate to matters of national security, rather than an ordinary criminal investigation. Prior to the instant case, neither the Supreme Court nor our Court had considered whether the Due Process Clause requires officials to provide ordinary administrative segregation hearings to persons detained under special conditions of confinement until cleared of connection with activities threatening national security. *Cf. Forsyth*, 472 U.S. at 534-35, 105 S. Ct. 2806 (granting Attorney General qualified immunity for warrantless wiretapping for national security purposes despite prohibitions of warrantless wiretapping in criminal context).

Third, the BOP regulation on which the Plaintiff relies itself contains potentially relevant exceptions that undermine certainty as to established requirements of law. "Administrative detention is to be used only for short periods of time except . . . where there are exceptional circumstances, *ordinarily tied to security or complex investigative concerns*," 28 C.F.R. § 541.22(c)(1) (emphasis added), and inmates are entitled to "an administrative detention order detailing the reasons for placing an inmate in administrative detention . . . *provided institutional security is not compromised thereby*," *id.* § 541.22(b) (emphasis added).

In sum, these factors, taken together, would suffice to raise "a legitimate question," *Forsyth*, 472 U.S. at 535 n.12, 105 S. Ct. 2806, among Government officials as to whether the Due Process Clause required administrative segregation hearings or any procedures other than the FBI's clearance system. *See id.* ("[W]here there is a *legitimate question* whether an exception to [a consti-

tutional requirement] exists," failure to abide by the requirement "cannot be said [to have] violate[d] clearly established law." (emphasis added)). Accordingly, we will direct dismissal of the portions of the Plaintiff's complaint alleging violations of procedural due process rights. *See* Compl. ¶¶ 204-06.

III. Conditions of Confinement

Hasty contends that Judge Gleeson should have dismissed the Plaintiff's conditions of confinement claims against him on the ground of qualified immunity because (1) the Plaintiff did not allege conditions amounting to a violation of substantive due process rights, (2) the Plaintiff failed to allege Hasty's deliberate indifference to the maintenance of the conditions of confinement, and (3) Hasty's actions were objectively reasonable under the circumstances.[10]

Because the Plaintiff was a pretrial detainee during his detention in the ADMAX SHU, his challenge to the conditions of his confinement arises from the substantive component of the Due Process Clause of the Fifth Amendment and not from the cruel and unusual punishment standards of the Eighth Amendment. *See Benjamin v. Fraser*, 343 F.3d 35, 49 (2d Cir. 2003) ("*Benjamin II*"). Pretrial detainees have not been convicted

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[10] There is some question as to whether Hasty sought to dismiss the substantive due process claim or the excessive force claim, *see* Part IV, *infra*, in the District Court on the ground of qualified immunity, as distinguished from the merits of the claim. However, the District Court understood all the Defendants to "seek dismissal of all claims against them on qualified immunity grounds," *Dist. Ct. op.* at *10, and we are satisfied that we have jurisdiction of an appeal from the rulings that are premised on that understanding.

of a crime and thus "may not be punished in any manner—neither cruelly and unusually nor otherwise." *Id.* at 49-50. Courts considering challenges to confinement brought by pretrial detainees must first consider whether the circumstances of the particular confinement render the confinement punitive; since some restraint is necessary to confine a pretrial detainee, not all uncomfortable conditions or restrictions are necessarily punitive. *Id.* at 50. In *Bell v. Wolfish, supra,* the seminal case on the substantive due process claims of pretrial detainees, the Supreme Court recognized the following factors as relevant to the determination of whether a condition of confinement is punitive:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ."

441 U.S. at 537-38, 99 S. Ct. 1861 (quoting *Mendoza-Martinez,* 372 U.S. at 168-69, 83 S. Ct. 554). A court may infer that a condition of confinement is intended as punishment if it is not reasonably related to a legitimate government objective. *See id.* at 539, 99 S. Ct. 1861.

The complaint alleges, among other things, that MDC staff placed the Plaintiff in solitary confinement, deliberately subjected him to extreme hot and cold tem-

peratures, shackled him every time he left his cell, and repeatedly subjected him to strip and body-cavity searches, and that these conditions were intended to be, and were in fact, punitive. Applying *Wolfish*, Judge Gleeson found these allegations sufficient to state a substantive due process claim, observing that whether the conditions were reasonably related to legitimate government objectives could not be determined on a motion to dismiss. *See Dist. Ct. op.* at *16.

Hasty contends that Judge Gleeson did not properly consider whether the Plaintiff alleged that he was "deprived of the minimal civilized measure of life's necessities" or whether Hasty was deliberately indifferent to the Plaintiff's health or safety. But this Court has never applied those standards in this context. In *Benjamin II*, we distinguished between challenges to disabilities imposed purposefully on pretrial detainees, which are analyzed under the *Wolfish* "punitive" inquiry, and pretrial detainees' challenges to prison environmental conditions. *See* 343 F.3d at 50. Recognizing that the "punitive" standard is neither required nor helpful in the context of environmental conditions, we adopted a modified version of the Eighth Amendment's deliberate indifference standard; we required a showing of deliberate indifference but stated that such indifference could be presumed from an absence of reasonable care. *See id.* We explicitly rejected analogies to the Eighth Amendment that would require a showing of wantonness on the part of the prison official, *see id.* at 51, or a showing that the alleged conditions were so inhumane as to constitute cruel and unusual punishment, *see id.* at 52 (citing *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)).

The Plaintiff has alleged the purposeful infliction of restraints that were punitive in nature. Accordingly, the District Court need not have considered whether a Defendant was "deliberately indifferent" in inflicting the restraints or whether the restraints constituted cruel and unusual punishment. The right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a pretrial detainee by subjecting him to the practices and conditions alleged by the Plaintiff.

The Plaintiff alleges that Hasty (1) requested that certain officials develop procedures for the ADMAX SHU, (2) knew of the conditions of confinement to which Plaintiff was subjected, (3) approved the strip search policy, and (4) knew or should have known of the practice or custom of beating detainees. Under a notice pleading standard, reaffirmed in *Bell Atlantic* and *Erickson*, these allegations are sufficient to state a claim that Hasty failed to remedy constitutional violations of which he was aware. Moreover, the general allegations of knowledge, which are sufficient under *Phelps*, cited above, *see* Part I(e), are bolstered by the allegation that Hasty directed other officers to set up procedures for the ADMAX SHU.

Hasty's final argument is that, even if the Plaintiff has pled the violation of a clearly established right, Hasty's actions were objectively reasonable in the post-9/11 context. He argues that the actions were taken "in the immediate aftermath of September 11th during the course of a large-scale investigation of unprecedented scope in United States history, and Plaintiff was, at that time, considered to be possibly complicit in the terrorist

acts." As discussed above, *see* Part I(f), the post-9/11 context does not lessen the Plaintiff's right, as a pretrial detainee, to be free of punitive conditions of confinement.

IV. Excessive Force

The only argument of a Defendant directed to the claim of excessive force is Hasty's contention that the complaint does not allege his personal involvement.

The complaint alleges that Hasty knew or should have known of the MDC practice of beating detainees in the ADMAX SHU, that he knew or should have known of the propensity of his subordinates to beat the Plaintiff unnecessarily, and that he was deliberately indifferent in failing to take action to curtail the beatings. The complaint also alleges that Hasty chose the officers who worked in the ADMAX SHU.

Applying the standards for supervisory liability, outlined above, *see* Part I(d), the Plaintiff's allegations, on a notice pleading standard, *see* Part I(e), suffice to state a claim of supervisory liability for the use of excessive force against the Plaintiff. *See Phelps*, 308 F.3d at 187 n.6 ("[A] plaintiff's allegation of knowledge is itself a particularized factual allegation, which he will have the opportunity to demonstrate at the appropriate time in the usual ways." (internal quotation marks omitted)). The plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of Hasty's knowledge because it is at least plausible that a warden would know of mistreatment inflicted by those under his command. Whether such knowledge can be proven must await further proceedings.

V. Interference with Right to Counsel

Hasty argues that the Plaintiff did not adequately plead a violation of his Sixth Amendment right to counsel because (1) the complaint does not state that he was charged with criminal (as opposed to immigration) offenses and (2) he failed to plead supervisory involvement. Although, as Judge Gleeson observed, "the complaint could have been more transparent regarding plaintiffs' status as pretrial detainees facing criminal charges," *see Dist. Ct. op.* at *23, the complaint does refer to interference with the Plaintiff's conversations with his "criminal attorney." This allegation was sufficient to give Hasty "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47, 78 S. Ct. 99. As for the issue of supervisory liability, the complaint alleges that Hasty "knew of and condoned the imposition of substantial restrictions on Plaintiff's right to communicate with counsel." The Plaintiff's allegations of knowledge are sufficient to state a claim of supervisory liability, and, for the reasons stated above, satisfy the plausibility standard without an allegation of subsidiary facts.

VI. Unreasonable Searches

Hasty challenges Judge Gleeson's conclusion that he is not entitled to qualified immunity at this stage on the Plaintiff's Fourth Amendment claim on the grounds that (1) the law on prisoners' Fourth Amendment right to be free from strip and body-cavity searches was not clearly established and (2) Judge Gleeson failed to explain why the searches of the Plaintiff did not serve legitimate penological interests.

As to whether the right to be free from strip and body-cavity searches was clearly established, Hasty argues that "the Circuits differ sharply on the existence of prisoner privacy rights under the Fourth Amendment outside of prison cells." This argument ignores the fact that it is this Circuit's law that determines whether a right is clearly established for purposes of a qualified immunity defense, *see Tellier*, 280 F.3d at 84, and Hasty does not reckon with the long line of Second Circuit cases on strip and body-cavity searches in prisons and jails. *See, e.g., Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986).

Under the *Saucier* framework for considering a qualified immunity defense, discussed above, we must first decide whether, assuming the Plaintiff's allegations are true, his Fourth Amendment rights were violated, which will require determining the proper standard for his claim.

The Supreme Court has held that visual body-cavity searches of pretrial detainees and prisoners after contact visits are not unreasonable under the Fourth Amendment, even in the absence of probable cause. *See Wolfish*, 441 U.S. at 558, 99 S. Ct. 1861. Emphasizing that the Fourth Amendment prohibits only unreasonable searches, the Court instructed judges to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 558-59, 99 S. Ct. 1861. Because of the potential for smuggling money, drugs, and weapons into prisons, the Court concluded that the practice of strip searching inmates after contact visits was not facially unconstitutional. *See id.*

at 559-60, 99 S. Ct. 1861. Applying *Wolfish*, this Court has concluded that, while it might be reasonable to strip search a prisoner before initially placing him in administrative detention, it would not be reasonable to conduct a second strip search shortly after the first search if the prisoner was under continuous escort the entire time. *See Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983).

Since *Wolfish* and *Hodges*, two lines of cases involving strip searches have evolved in this Circuit. In *Weber v. Dell*, jail officials conducted a visual body-cavity search on a woman arrested on misdemeanor charges. *See* 804 F.2d at 799. This Court ruled that

> the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.

Id. at 802; *see Wachtler v. County of Herkimer*, 35 F.3d 77, 81 (2d Cir. 1994) (accepting *Weber* but upholding immunity defense on the basis of reasonable suspicion of contraband); *Walsh v. Franco*, 849 F.2d 66, 69 (2d Cir. 1988) (applying *Weber* to hold a search unconstitutional).

However, in *Covino v. Patrissi*, we applied the "legitimate penological interests" standard outlined in *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), to assess the constitutionality of a strip search of a pretrial detainee held in a prison with sentenced inmates. The prison in which Covino was detained had a policy of random visual body-cavity

searches. *Covino*, 967 F.2d at 75. Observing that the Supreme Court applied *Turner*'s "legitimate penological interests" test to all claims that prison regulations violate constitutional rights, *see Washington v. Harper*, 494 U.S. 210, 223-24, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), we analyzed the random search policy under the four factors of *Turner*:

> (i) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (ii) whether there are alternative means of exercising the right in question that remain open to prison inmates; (iii) whether accommodation of the asserted constitutional right will have an unreasonable impact upon guards and other inmates, and upon the allocation of prison resources generally; and (iv) whether there are reasonable alternatives available to the prison authorities.

Covino, 967 F.2d at 78-79 (citing *Turner*, 482 U.S. at 89-90, 107 S. Ct. 2254). Applying these factors, we concluded that the regulation was rationally related to legitimate security interests, there were no alternative means of exercising the detainee's right that would allow the prison to achieve the same level of effectiveness, the regulation accommodated the privacy rights of the detainee by conducting the search behind closed doors, and there was no "alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 79-80 (internal quotation marks omitted).

In 2001, we attempted to reconcile these two lines of cases in *Shain v. Ellison*, *supra*. Judge Pooler's opinion for the majority observed that the *Turner* test governs

the constitutionality of *prison* regulations. *See Shain*, 273 F.3d at 65. By limiting *Covino* to *prison* regulations, she reconciled *Covino* and the "reasonable suspicion" line of cases beginning with *Weber*, which all concerned events occurring in *jails*. *See id.* at 65-66. In concurrence, Judge Katzmann remarked that this Circuit's precedents required a distinction "either between misdemeanors and felonies or between jails and prisons," but observed that he did not find the distinction persuasive. *See id.* at 70. Judge Cabranes, in dissent, criticized the jail/prison distinction and argued that *Weber*'s "reasonable suspicion" rule was not good law in light of *Turner*. *Id.* at 71-74; *see also N.G. v. Connecticut*, 382 F.3d 225, 234-35 (2d Cir. 2004) (rejecting the *Turner* standard for strip searches in juvenile detention centers).

On this appeal, the parties assume, as did Judge Gleeson, *see Dist. Ct. op.* at *26, that the proper inquiry is whether the Plaintiff was housed at a jail or a prison. Finding that the MDC was most like a prison, Judge Gleeson applied the *Covino/Turner* standard. *See id.* This was correct. The Plaintiff was confined for an extended period of time in a prison-like environment, and it appears that he was charged with felonies, *see* 18 U.S.C. §§ 371, 1028. In the environment where the Plaintiff was held, the lesser reasonable suspicion standard would jeopardize prison officials' ability to maintain security.

As Judge Gleeson recognized, even if the precise standard governing intrusive searches of the Plaintiff at the MDC might not have been clearly established in 2001, it was clearly established that even the standard most favorable to prison officials required that strip and

body-cavity searches be rationally related to legitimate government purposes. *Cf. Hodges*, 712 F.2d at 35 (holding that a plaintiff stated a Fourth Amendment claim where consecutive body-cavity searches were unnecessary). The complaint alleges that the Plaintiff was routinely strip searched twice after returning from the medical clinic or court and that, on one occasion, the Plaintiff was subjected to three serial strip and body-cavity searches in the same room. He also alleges that he was subjected to strip and body-cavity searches every morning. These allegations may reasonably be understood to claim that repeated strip and body-cavity searches were unrelated to legitimate government purposes and apparently were performed to punish. The Plaintiff has adequately alleged a violation of his clearly established Fourth Amendment rights. Of course, the success or failure of these claims will turn on the specific facts that are revealed after discovery or at trial.

Although exigent circumstances can justify some conduct that would otherwise violate Fourth Amendment standards, *see, e.g., Tyler*, 436 U.S. at 509, 98 S. Ct. 1942 (exigent circumstances justify warrantless entry into a home), the post-9/11 context does not provide a basis for conducting repeated and needless strip and body-cavity searches of a pretrial detainee. *See* Part I(f), above.

VII. Interference with Religious Practices

Hasty also argues that Judge Gleeson should have dismissed the Plaintiff's First Amendment claim against him on qualified immunity grounds because (1) BOP regulations "conclusively establish" a lack of personal involvement and (2) the Plaintiff did not allege a violation of his First Amendment rights.

Both arguments lack merit. Hasty contends that the only "policy" on religion at the MDC was the official BOP policy, codified at 28 C.F.R. part 548, and that the Plaintiff has not indicated that these policies were suspended or that he availed himself of available complaint procedures, *see* 28 C.F.R. part 542. Hasty contends that he "was under no clearly established constitutional obligation to take affirmative steps to inquire whether Plaintiff observed particular religious practices, but as the BOP regulations instruct, Plaintiff had the responsibility to make his religious preferences known." Br. for Hasty at 47. But neither the complaint procedures nor the official policy governing religion allowed Hasty to ignore violations of detainees' First Amendment rights. If Hasty is arguing that the Plaintiff has forfeited his right to recover damages because he did not follow administrative complaint procedures, this may be relevant to the merits of the case, but it is not relevant to a qualified immunity defense.

Similarly without merit, Hasty argues that he could not be personally involved in any deprivations of religious freedom because BOP regulations establish that prison chaplains "are responsible for managing religious activities within the institution." 28 C.F.R. § 548.12. As the Plaintiff points out, however, Hasty ignores other regulations stating that the warden determines, among other things, what religious items may be used by prisoners, *see id.* § 548.16, and whether attendance at religious functions is open to all prisoners, *id.* § 548.15.

Hasty's second argument is that Plaintiff has not alleged a violation of his First Amendment rights. He relies on *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987), which applied

Turner's "legitimate penological interests" test to First Amendment claims, *see id.* at 348-49, 107 S. Ct. 2400. Though recognizing that a prison regulation precluded some Muslim prisoners from attending Friday prayers, *see id.* at 345, 107 S. Ct. 2400, the Supreme Court found the regulation justified under *Turner,* focusing on the officials' legitimate security objectives and the availability of other channels by which prisoners could exercise their religious rights, *see id.* at 350-53, 107 S. Ct. 2400. In the pending case, however, the Plaintiff alleges that he was not allowed to attend Friday prayers, that prison guards banged on his door when he tried to pray, and that his Koran was routinely confiscated.[11] These allegations suffice to preclude a qualified immunity defense at this stage of the litigation. In particular, consideration of Hasty's arguments—that "restrictions on movement and possessions . . . were a necessary part of the legitimate and proper functioning of the maximum security procedures in the ADMAX SHU" and that such restrictions were "justified by security concerns and other institutional needs," Br. for Hasty at 49-50—must await factual discovery so that the Government's asserted security interests can be assessed against a factual record of what restrictions actually existed and what purpose they served.

VIII. Racial and Religious Discrimination

The Defendants argue that they are entitled to qualified immunity on the Plaintiff's First Amendment claim of religious discrimination and Fifth Amendment claim

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[11] Hasty's arguments that the repeated banging on Iqbal's cell while he prayed shows that he was at least allowed to pray, and that the repeated confiscation of his Koran shows that he was at least permitted to have a Koran need no response

of racial or ethnic discrimination on three grounds: (1) the Plaintiff has failed to state a violation of clearly established rights, (2) the Plaintiff's allegations of discriminatory intent are too conclusory, and (3) the Plaintiff has not alleged the personal involvement of Ashcroft and Mueller.[12]

The arguments of Ashcroft and Mueller challenging the sufficiency of the Plaintiff's race, ethnic, and religious discrimination claims misunderstand his complaint. They contend that his "complaint amounts to an objection that most of those persons determined to be of high interest to the 9/11 investigation were Muslim or from certain Arab countries," which they justify by pointing out that the 9/11 hijackers were Muslims from Arab countries. However, what the Plaintiff is alleging is that he was deemed to be "of high interest," and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion. The Plaintiff also alleges that "Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." These allegations are sufficient to state a claim of animus-based discrimination that any "reasonably competent officer" would understand to have been illegal under prior case law. *See Malley,* 475 U.S. at 341, 106 S. Ct. 1092; *see also Hayden v. County of Nassau,* 180 F.3d 42, 48 (2d Cir. 1999) (stating that racial classifications violate Equal Protection Clause where motivated by racial animus and having a discriminatory effect). Accordingly, the Plaintiff's racial, ethnic, and religious discrimination claims

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[12] Judge Gleeson dismissed the discrimination claims against the BOP Defendants. *See Dist. Ct. op.* at *29.

cannot be dismissed on qualified immunity grounds at this stage of the litigation.

Hasty also argues that the Plaintiff has failed to state a claim of discrimination. Citing *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) ("*AAADC*"), he argues that the Equal Protection Clause does not apply in the context of proceedings to remove illegal aliens and that the Government can permissibly deem nationals of a particular country to be a special threat. In *AAADC*, the Supreme Court concluded that a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(g), deprived the federal courts of jurisdiction to consider an illegal alien's selective enforcement challenge to deportation. *See* 525 U.S. at 487, 119 S. Ct. 936. The Court rejected the argument that it nevertheless had jurisdiction to consider an alien's constitutional arguments, holding that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation," *see id.* at 488, 119 S. Ct. 936, even when the Government deports the alien "for the additional reason that it believes him to be a member of an organization that supports terrorist activity," *id.* at 492, 119 S. Ct. 936. *AAADC* affords the Defendants no relief. The Plaintiff is not challenging his deportation or even his arrest on criminal charges. Moreover, *AAADC* does not stand for the proposition that the Government may subject members of a particular race, ethnicity, or religion to more restrictive conditions of confinement than members of other races, ethnic backgrounds, or religions.

The Defendants argue that the Plaintiff's allegations of racial, ethnic, and religious animus are too conclusory. But, as discussed above, *see* Part I(e), *Crawford-El* indicates that courts cannot require a heightened pleading standard for civil rights complaints involving improper motive. In *Phillip*, 316 F.3d at 298-99, this Court held that *Swierkiewicz*'s notice pleading standard applied to a civil rights complaint alleging racial animus. Although recognizing that the complaint did not "contain many evidentiary allegations relevant to intent," *see id.* at 299, we found the allegations sufficient to state a claim, observing that the complaint alleged that the plaintiffs were African-American, described the defendants' actions in detail, and alleged that the plaintiffs were selected for maltreatment "solely because of their color," *id.* at 298.

The Plaintiff's allegations suffice to state claims of racial, ethnic, and religious discrimination. He alleges in particular that the FBI Defendants classified him "of high interest" solely because of his race, ethnic background, and religion and not because of any evidence of involvement in terrorism. He offers additional factual support for this allegation, stating that "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September 11th investigation." We need not consider at this stage of the litigation whether these allegations are alone sufficient to state a clearly established constitutional violation under the circumstances presented because they are sufficient to state a violation when combined with the Plaintiff's allegation that, un-

der the policy created and implemented by the Defendants, he was singled out for unnecessarily punitive conditions of confinement based on his racial, ethnic, and religious characteristics.

Finally, Ashcroft and Mueller argue that the Plaintiff failed to allege their personal involvement in any discrimination. However, the complaint alleges broadly that Ashcroft and Mueller were instrumental in adopting the "policies and practices challenged here." The complaint also alleges that the FBI, "under the direction of Defendant Mueller," arrested thousands of Arab Muslims and that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject Plaintiff[] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The Plaintiff acknowledges that the FBI Defendants made the determination that Plaintiff was "of high interest," but this allegation does not necessarily insulate Ashcroft and Mueller from personal responsibility for the actions of their subordinates under the standards of supervisory liability outlined above, *see* Part I(d). As with the procedural due process claim, the allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11. Whether or not the issues of personal involvement will be clarified by court-supervised discovery sufficient

to support summary judgment remains to be determined.

IX. Section 1985(3) Conspiracy

The Defendants contend that they are entitled to qualified immunity on the Plaintiff's conspiracy claims under 42 U.S.C. § 1985(3) because (1) it was not clearly established that federal officials were subject to liability under section 1985(3), and (2) the Plaintiff's allegations of conspiracy are too conclusory to state a violation of clearly established law.

Clearly established law. A conspiracy claim under 42 U.S.C. § 1985(3) has four elements: (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen. *See United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott,* 463 U.S. 825, 828-29, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983). In addition, the conspiracy must be motivated by some class-based animus. *See Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971).

In *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir. 1949), this Court considered a section 1985(3) claim against several federal officials stemming from an allegedly false arrest. The Court first held that the officials had absolute immunity from the false arrest claim. *See id.* at 580-81. Turning to the section 1985(3) claim, the Court rejected the plaintiff's argument that "this language creates a claim against any two persons who conspire to injure another for spite or other improper motives, apparently because to single out anyone for illegal

aggression is to deny him equal protection of the laws." *Id.* at 581. *Gregoire* has been interpreted by some lower courts to mean that section 1985(3) does not apply to federal officials. *See, e.g., Lofland v. Meyers,* 442 F. Supp. 955, 957 (S.D.N.Y. 1977); *Williams v. Halperin,* 360 F.Supp. 554, 556 (S.D.N.Y. 1973); *see also Hobson v. Wilson,* 737 F.2d 1, 19 (D.C. Cir. 1984) (criticizing *Gregoire*).

In *Griffin,* the Supreme Court held that section 1985(3) contains no requirement of state action and thus applies to private conspiracies. *See* 403 U.S. at 101, 91 S. Ct. 1790. Although this Court has had no occasion since *Gregoire* to consider whether section 1985(3) applies to conspiracies among federal officials, numerous courts of appeals, applying *Griffin,* have concluded that section 1985(3) applies to federal officials. *See, e.g., Hobson,* 737 F.2d at 20; *Jafree v. Barber,* 689 F.2d 640, 643 (7th Cir. 1982); *Gillespie v. Civiletti,* 629 F.2d 637, 641 (9th Cir. 1980); *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926, 931 (10th Cir. 1975).[13] We agree that the development of case law since *Gregoire* has eroded any basis for interpreting that decision to render section 1985(3) inapplicable to federal officials. And we also agree that, in the absence of prior Second Circuit case law on point, it was not clearly established in 2001 that section 1985(3) applied to federal officials. However, even without a definitive ruling from this Court on

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[13] BOP Defendant Cooksey cites post-*Griffin* cases from the Fifth and Third Circuits stating that section 1985(3) does not apply to federal officials. *See, e.g., Mack v. Alexander,* 575 F.2d 488, 489 (5th Cir. 1978); *Bethea v. Reid,* 445 F.2d 1163, 1164 (3d Cir. 1971). However, these cases cite pre-*Griffin* cases for this proposition and neglect to consider *Griffin.*

the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws, at least where the officials' conduct, alleged to have accomplished the discriminatory object of the conspiracy, would violate the Equal Protection Clause. As we have recently held, "[T]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo v. City of Bridgeport*, No. 05-4302-cv, 2007 U.S. App. LEXIS 16171, at *39 (2d Cir. June 12, 2007) (collecting cases), *amending* 479 F.3d 196 (2d Cir. 2007).

Adequacy of allegations. Applying the normal pleading rules previously discussed, *see* Part I(e), even as supplemented by the plausibility standard, we have no doubt that the Plaintiff's allegations of a conspiracy to discriminate on the basis of ethnicity and religion suffice to withstand a motion to dismiss. Unlike the situation in *Bell Atlantic*, we do not encounter here a bare allegation of conspiracy supported only by an allegation of conduct that is readily explained as individual action plausibly taken in the actors' own economic interests.

X. Personal Jurisdiction

The final issue is whether Judge Gleeson erred in denying the motions by Ashcroft, Mueller, and FBI Defendant Rolince to dismiss for lack of personal jurisdiction. Ordinarily, we would lack jurisdiction over this issue on this interlocutory appeal concerning qualified immunity. However, "[a] defendant who is entitled to immediate appellate review of a qualified immunity decision is also entitled to appellate review of pendant issues if those issues are inextricably intertwined with the

question of qualified immunity or are otherwise necessary to ensure meaningful review of it." *Toussie v. Powell*, 323 F.3d 178, 184 (2d Cir. 2003) (internal quotation marks omitted). "Whether issues are inextricably intertwined is determined by whether there is substantial factual overlap bearing on the issues raised." *Id.* (internal quotation marks omitted). Judge Gleeson recognized the overlap between the Defendants' personal jurisdiction arguments and personal involvement arguments pertaining to qualified immunity. *See Dist. Ct. op.* at *10.

Under New York's long-arm statute, a court may exercise jurisdiction over a non-domiciliary who "in person or through an agent . . . commits a tortious act within the state" so long as the cause of action arises from that act. *See* N.Y. C.P.L.R. § 302(a)(2). As the District Court observed, *see Dist. Ct. op.* at *9-*10, personal jurisdiction cannot be predicated solely on a defendant's supervisory position. *See Ontel Products, Inc. v. Project Strategies Corp.*, 899 F. Supp. 1144, 1148 (S.D.N.Y. 1995). Rather, a plaintiff must show that a defendant "personally took part in the activities giving rise to the action at issue." *Id.*

The same intertwining of the issue of personal involvement with the issue of personal jurisdiction that provides us with pendent appellate jurisdiction also demonstrates that the pleading of personal involvement suffices to establish personal jurisdiction, at least at this preliminary stage of the litigation.

Conclusion

For the foregoing reasons, the order of the District Court is affirmed as to the denial of the Defendants' motions to dismiss all of the Plaintiff's claims, except for the claim of a violation of the right to procedural due process, as to which we reverse. In affirming almost all of the District Court's ruling, we emphasize that we do so at an early stage of the litigation. We recognize, as did Judge Gleeson in ruling on the Plaintiff's procedural due process claim, *see Dist. Ct. op.* at *21, that carefully limited and tightly controlled discovery by the Plaintiff as to certain officials will be appropriate to probe such matters as the Defendants' personal involvement in several of the alleged deprivations of rights. We are mindful too that, for high-level officials, this discovery might be either postponed until discovery of front-line officials is complete or subject to District Court approval and additional limitations. We also recognize that the Defendants will be entitled to seek more specific statements as to some of the Plaintiff's claims and perhaps renew their claims for qualified immunity by motions for summary judgment on a more fully developed record.

In sum, the serious allegations of gross mistreatment set forth in the complaint suffice, except as noted in this opinion, to defeat the Defendants' attempt to terminate the lawsuit at a preliminary stage, but, consistent with the important policies that justify the defense of qualified immunity, the defense may be reasserted in advance of trial after the carefully controlled and limited discovery that the District Court expects to supervise.

Affirmed in part, reversed in part, and remanded.

JOSÉ A. CABRANES, Circuit Judge, concurring:

I concur fully in Judge Newman's characteristically careful and comprehensive opinion, which seeks to hew closely to the relevant Supreme Court and Second Circuit precedents, including the Supreme Court's decision in *Bell Atlantic v. Twombly*, —U.S.—, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). That said, it is worth underscoring that some of those precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity; to say the least, "the guidance they provide is not readily harmonized," Maj. Op. at 153.

Most importantly, the opinion's discussion of the relevant pleading standards reflects the uneasy compromise—forged partially in dicta by the Supreme Court in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)—between a qualified immunity privilege rooted in the need to preserve "the effectiveness of government as contemplated by our constitutional structure," *Harlow v. Fitzgerald*, 457 U.S. 800, 820 n.35, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Here, that uneasy compromise presents itself in a case brought by Javaid Iqbal, a federally convicted felon now residing in his native Pakistan. Iqbal does not challenge his arrest in the aftermath of 9/11, his detention, his conviction, or his apparent subsequent deportation. Iqbal instead challenges his separation from the general prison population at the Metropolitan Detention Center and his treatment during that separation. He claims that his separation stemmed from a general policy authorized at the highest levels of government in the wake of 9/11. But most, if not all, of the assertedly unlawful

actions in his complaint—including the decision to place plaintiff in the ADMAX SHU and the abuses which purportedly ensued there—are alleged to have been carried out by defendants much lower in the chain of command.

Nevertheless, as a result of the Supreme Court's precedents interpreting Rule 8(a), even as modified by the "plausibility standard" established in *Bell Atlantic*, 127 S. Ct. at 1968, it is possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and possibly to a jury trial, regarding Iqbal's claims. If so, these officials—FBI Director Robert Mueller and former Attorney General John Ashcroft—may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic. In *Bell Atlantic*, the Supreme Court has quite rightly expressed concern that "careful case management" might not be able to "weed[ ] out early in the discovery process" an unmeritorious claim in private civil antitrust litigation, *see Bell Atlantic*, 127 S. Ct. at 1967, and might have limited success in "checking discovery abuse," *id.* This concern is all the more significant in the context of a lawsuit against, *inter alia*, federal government officials charged with responsibility for national security and entitled by law to assert claims of qualified immunity. Even with the discovery safeguards carefully laid out in Judge Newman's opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of

the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

The decision in this case may be required by the faithful application of the relevant precedents by a court of inferior jurisdiction. But a detached observer may wonder whether the balance struck here between the need to deter unlawful conduct and the dangers of exposing public officials to burdensome litigation—a balance compelled by the precedents that bind us—jeopardizes the important policy interest Justice Stevens aptly described as "a national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell v. Forsyth*, 472 U.S. 511, 541, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (Stevens, J., concurring in the judgment).[1]

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[1] The Supreme Court's recognition in *Bell Atlantic* that "proceeding to . . . discovery can be expensive," *Bell Atlantic*, 127 S. Ct. at 1967 has particular resonance where, as here, discovery would not only result in significant cost but would also deplete the time and effectiveness of current officials and the personal resources of former officials. Indeed, as Justice Stevens noted, "[p]ersons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and [in some cases] politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office." *Mitchell*, 472 U.S. at 542, 105 S. Ct. 2806 (Stevens, J. concurring in the judgment); *see also Harlow*, 457 U.S. at 814, 102 S. Ct. 2727 (noting the "danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties" (alteration in original) (internal quotation marks omitted)).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 04-CV-01809-JG SMG

EHAB ELMAGHRABY AND JAVAID IQBAL, PLAINTIFF

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION; KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATIONS; KATHLEEN HAWK SAWYER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS; DAVID RARDIN, FORMER DIRECTOR OF THE NORTHEAST REGION OF THE BUREAU OF PRISONS; MICHAEL COOKSEY, FORMER ASSISTANT DIRECTOR FOR CORRECTIONAL PROGRAMS OF THE BUREAU OF PRISONS; DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL ZENK, WARDEN OF THE METROPOLITAN DETENTION CENTER; LINDA THOMAS, FORMER ASSOCIATE WARDEN OF PROGRAMS OF THE METROPOLITAN DETENTION CENTER; ASSOCIATE WARDEN SHERMAN, ASSOCIATE WARDEN OF CUSTODY FOR THE METROPOLITAN DETENTION CENTER; CAPTAIN SALVATORE LOPRESTI; LIEUTENANT STEVEN BARRERE; LIEUTENANT WILLIAM BECK; LIEUTENANT LINDSEY

BLEDSOE; LIEUTENANT JOSEPH CUCITI; LIEUTENANT THOMAS CUSH; LIEUTENANT HOWARD GUSSAK; LIEUTENANT MARCIAL MUNDO; LIEUTENANT DANIEL ORTIZ; LIEUTENANT ELIZABETH TORRES; CORRECTIONS OFFICER REYNALDO ALAMO; CORRECTIONS OFFICER SIDNEY CHASE; CORRECTIONS OFFICER JAMES CLARDY; CORRECTIONS OFFICER RAYMOND COTTON; CORRECTIONS OFFICER MICHAEL DEFRANCISCO; CORRECTIONS OFFICER RICHARD DIAZ; CORRECTIONS OFFICER JAI JAIKISSON; CORRECTIONS OFFICER DEXTER MOORE; CORRECTIONS OFFICER JON OSTEEN; CORRECTIONS OFFICER ANGEL PEREZ; CORRECTIONS OFFICER SCOTT ROSEBERRY; UNIT MANAGER CLEMMETT SHACKS; NORA LORENZO, PHYSICIAN'S ASSISTANT; "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "JOHN DOE" BEING FICTIONAL FIRST AND LAST NAMES, AND THE UNITED STATES OF AMERICA, DEFENDANTS

Sept. 27, 2005

MEMORANDUM AND ORDER

GLEESON, J.

Plaintiffs Ehab Elmaghraby and Javaid Iqbal are Muslim men from Egypt and Pakistan, respectively, who were arrested on criminal charges in the months following September 11, 2001, and detained at the Metropoli-

tan Detention Center ("MDC") in Brooklyn, New York.[1] Plaintiffs allege that they and other Muslim men were arbitrarily classified as persons "of high interest" to the government's terrorism investigation following the September 11 attacks, and accordingly were housed in the Administrative Maximum Special Housing Unit (the "ADMAX SHU") of the MDC instead of in a general population unit of the facility. Neither plaintiff was afforded the opportunity to contest his classification or continued confinement in the ADMAX SHU. Elmaghraby remained confined there for the entire time he was detained in the MDC-from October 1, 2001 until August 28, 2002. Iqbal remained in the ADMAX SHU from January 8, 2002, when he was transferred there from the general population, until the end of July 2002, when he was returned to the general population.

Plaintiffs allege that during their confinement in the ADMAX SHU, they were subjected to, among other things, severe physical and verbal abuse; unnecessary and abusive strip and body-cavity searches; extended detention in solitary confinement; deliberate interference with the exercise of their religious beliefs; and de-

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[1] Elmaghraby was arrested on September 30, 2001. Charged with violating 18 U.S.C. § 1029 (producing/trafficking in a counterfeit device), Elmaghraby pleaded guilty on February 13, 2002, and was sentenced to a 24-month term of imprisonment on July 22, 2002. A criminal complaint was filed against Iqbal on November 5, 2001, charging him with violations of 18 U.S.C. §§ 371 & 1028 (conspiracy to defraud the United States and fraud with identification). He pleaded guilty on April 22, 2002, and was sentenced to a 16-month term of imprisonment on September 17, 2002. *See* Docket Reports for *United States v. Elmaghraby*, Docket No. 01-cr-1175 (ILG); *United States v. Iqbal*, Docket No. 01-cr-1318 (ILG).

liberate interference with their attempts to communicate with counsel. In addition, plaintiffs allege that they were denied adequate exercise, nutrition, and medical treatment. As a result of their treatment while in detention, plaintiffs allege that they suffered severe physical injuries, emotional distress and humiliation.

Plaintiffs further allege that they were subjected to these harsh conditions because of their race, national origin, and religion, and that their continued detention under these conditions stemmed from a discriminatory policy created by high-level officials in the executive branch of the federal government.

Plaintiffs allege violations of their constitutional rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments and seek damages pursuant to principles set forth in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs also assert claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350; the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb; the civil rights conspiracy statute, 42 U.S.C. § 1985(3); and the Federal Tort Claims ("FTCA"), 28 U.S.C. § 2671 *et seq.*

In addition to bringing claims against the MDC officers with whom they had direct contact, plaintiffs name as defendants former Attorney General John Ashcroft; Robert Mueller, the Director of the Federal Bureau of Investigation ("FBI"); Michael Rolince, the former Chief of the Counterterrorism Division of the FBI's International Terrorism Operations Section; Kenneth Maxwell, the former Assistant Special Agent in Charge of the FBI's New York Field Office; Kathleen Hawk Sawyer, the former Director of the Bureau of Prisons ("BOP"); Michael Cooksey, the former Assistant Direc-

tor for Correctional Programs of the BOP; and David Rardin, the former Director of the Northeast Region of the BOP. These defendants have moved to dismiss all the claims against them, as have Dennis Hasty and Michael Zenk (the former and current Wardens of the MDC, respectively), and Nora Lorenzo (a physician's assistant at the MDC).[2] The United States has also moved pursuant to the Liability Reform Act, 28 U.S.C. § 2679, to be substituted as the sole defendant on the claims brought under the Alien Tort Statute and for dismissal of those claims.

For the following reasons, the motions to dismiss are granted in part and denied in part.

BACKGROUND

A. *Overview*

For the purposes of this motion, I assume, as I must, that plaintiffs' allegations are true.[3] On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States, including the World Trade Center. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004). Approximately 3,000 people were killed in those attacks. *Id.* In the months following September 11, the FBI arrested and detained thousands of Arab Muslim men

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[2] For ease of discussion, I refer to the individual defendants who have moved to dismiss as, collectively, "defendants." In addition, I refer to certain sub-groups of defendants as follows: Mueller, Rolince, and Maxwell as "the FBI Defendants"; Hawk Sawyer, Cooksey, and Rardin as "the BOP Defendants"; Hasty and Zenk as "the Wardens," and MDC officials other than the Wardens as "MDC Defendants."

[3] On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must assume as true all factual allegations made in the complaint. *See Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir. 1995).

(designated herein as "post-September 11 detainees") as part of its investigation into the attacks.[4]

Plaintiffs allege that FBI officials Rolince and Maxwell classified them, along with many post-September 11 detainees, as persons "of high interest" to the government's terrorism investigation. Plaintiffs assert that they were classified as such based solely on their race, religion, and national origin, and not on any evidence of their involvement in supporting terrorist activities. Indeed, plaintiffs allege that within the New York area, "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September-11th investigation." (Compl. ¶ 52.)

Plaintiffs and other "of high interest" detainees were confined in the ADMAX SHU, a special housing unit at the MDC created specifically to house post-September 11 detainees in highly restrictive conditions ("Administrative Maximum" refers to the most restrictive type of

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[4] While motions to dismiss are evaluated based on facts alleged in the complaint, this does not mean that the complaint must be viewed in a factual vacuum. Following the attacks on September 11, 2001, the FBI immediately initiated a massive investigation into the attacks. *See* United States Department of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 1 (April 2003) (the *"April 2003 OIG Report"*). Within 3 days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation. *Id.* at 11-12. By September 18, 2001, the FBI had received more than 96,000 leads from the public. *Id.* at 12.

detention permitted under BOP procedures).[5] Plaintiffs allege that former Warden Hasty, Associate Warden Sherman, and Captain Salvatore Loprestri selected the officers to work in the ADMAX SHU. Further, plaintiffs allege that the procedures for handling detainees within this restrictive unit were developed by Sherman, Lopestri, and Lieutenant Joseph Cuciti at the request of Hasty.

As discussed below, the conditions in the ADMAX SHU were highly restrictive. Detainees were kept in solitary confinement. When they were moved, they were escorted by four officers and restrained with handcuffs and leg irons (a "four-man hold restraint policy"). Hand-held cameras were used to record detainee movements, and video cameras were placed in each cell.

For many weeks, Elmaghraby and other post-September 11 detainees were subjected to a communications blackout that barred them from receiving telephone calls, visitors, or mail. During this period, Elmaghraby and other detainees were unable to make contact with their attorneys or their families. In addition, MDC employees often turned away attorneys and family members by falsely stating that the individual detainee was no longer housed in the MDC. When detainees were allowed visitors, a clear partition separated the parties so that no physical contact was possible.

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[5] *See* 28 C.F.R. § 541.22 ("Administrative detention is the status of confinement of an inmate in a special housing unit in a cell either by self or with other inmates which serves to remove the inmate from the general population."). Prior to September 11, the MDC had a special housing unit, but it did not have one designated as Administrative Maximum, which provides more restrictive confinement than normal SHUs. *See* April 2003 OIG Report at 118-119.

Plaintiffs and other post-September 11 detainees were not provided with the periodic individual reviews required by BOP regulations to determine whether their continued detention in the ADMAX SHU was appropriate.[6] Instead, post-September 11 detainees were held in the ADMAX SHU until the FBI "cleared" them of connections to terrorist activity and approved their release to the general population. Post-September 11 detainees remained in the ADMAX SHU until Michael Cooksey, the Former Assistant Director for the Correctional Programs of the BOP, issued a memorandum approving the release of the individual detainee into the general population unit.

Plaintiffs allege that this "hold until cleared" policy was approved by former Attorney General Ashcroft and FBI Director Mueller "in discussions in the weeks after September 11, 2001." (Compl. ¶ 69.) Further, plaintiffs allege that (1) on October 1, 2001, Cooksey directed that all "of high interest" detainees be confined in the most restrictive conditions possible until cleared by the FBI; (2) former BOP Director Hawk Sawyer was aware and approved of this policy of restrictive detention for "of high interest" detainees; (3) Rolince and Maxwell were responsible for determining whether a post-September 11th detainee had been "cleared" of any connection to terrorist activities; (4) FBI officials in Washington, D.C. were aware that the BOP relied on the FBI's "high interest" classification to determine whether to detain prisoners in the ADMAX SHU of the MDC; (5) notwith-

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[6] *See* 28 C.F.R. § 541.22(c) (requiring formal reviews and hearings for each inmate in administrative detention to determine whether their continued administrative detention is warranted).

standing that awareness, Ashcroft, Mueller, and Rolince failed to impose deadlines for the clearance process; (6) as a result, numerous detainees, including plaintiffs, were held in the ADMAX SHU for extended periods of time although there was no evidence linking them to terrorist activity; and (7) Rolince and Maxwell failed to approve post-September 11th detainees' release to the general population because of the detainees' race, religion, and national origin, and not on any evidence that continued detention in the ADMAX SHU was important or relevant to the FBI's investigation of the events of September 11, 2001.

B. *Conditions of Confinement in the ADMAX SHU*

Elmaghraby was arrested on September 30, 2001 by local and federal law enforcement agents. On October 1, 2001, Elmaghraby was brought to the MDC and housed in the ADMAX SHU. He remained confined in this highly restrictive unit throughout his detention at the MDC, until August 28, 2002. Iqbal was arrested on November 2, 2001 by INS and FBI agents. On November 5, 2001, Iqbal was taken to the MDC and housed in the general population on the fifth floor. He was transferred to the ADMAX SHU on January 8, 2002, and remained in detention there until the end of July 2002, at which time he was released back to the general population.

Plaintiffs allege that while detained in the ADMAX SHU they were (1) kept in solitary confinement; (2) prohibited from leaving their cells for more than one hour each day with few exceptions; (3) verbally and physically abused; (4) routinely subjected to humiliating and unnecessary strip and body-cavity searchesl; (5) denied access to basic medical care; (6) denied access to legal

counsel; (7) denied adequate exercise and nutrition; (8) housed in small cells where the lights were left on almost 24 hours a day;[7] (9) deliberately subjected to air conditioning during the winter months and heat during the summer months; (10) deprived of adequate bedding or personal hygiene items;[8] and (11) they were deprived of adequate food, as a result of which Iqbal lost over 40 pounds (and suffers from persistent digestive problems) and Elmaghraby lost 20 pounds.

Plaintiffs further allege that they were subjected to continuous verbal abuse from the MDC staff. For example, Iqbal was called a terrorist by Zenk; "a terrorist and a killer," by Lieutenant Howard Gussak; a "Muslim bastard" by Officer Raymond Cotton; and a "Muslim killer" by Officer Perez. Elmaghraby was called a terrorist by Unit Manager Clemmett Shacks, was told that "a terrorist should not ask for anything" by Cotton, and, when he requested a pair of shoes, former Associate Warden of Programs Linda Thomas responded "no shoes for a terrorist."

Whenever plaintiffs were removed from their cells, they were handcuffed and shackled around their legs and waist. On the rare occasions when they were permitted to exercise, the officers subjected them to the harsh effects of the weather for purely punitive reasons. For example, during the winter months, MDC officers left Elmaghraby outside in the open-air recreation area for hours without a proper jacket or shoes. As the

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[7] The 24-hour lighting of the cells ended in March 2002. (Compl. ¶ 84.)

[8] For the first three months of his confinement, Elmaghraby was not given a blanket, pillow, mattress, or any toilet paper; Iqbal was never provided with pillows or more than one blanket.

weather became milder, he was permitted to remain outside for only 15 minutes. In the summer months, when it was extremely hot and humid, Elmaghraby was again left outside for hours. Iqbal was also not provided with proper clothing when permitted to exercise in the winter. In addition, on certain days when it rained, Iqbal was left out in the open-air recreation area for hours. When he was brought back to his cell, drenched, officers turned on the air conditioner deliberately, causing him severe physical discomfort.

During their confinement in the ADMAX SHU, plaintiffs were never afforded any individualized review to determine whether their continued detention under highly restrictive conditions was appropriate.

C. *Excessive Force*

1. *Elmaghraby*

Elmaghraby alleges that on the day he arrived at the MDC, officers threw him against a wall, subjected him to repeated strip searches and threatened him with death. Officers continually accused him of being a terrorist associated with Osama Bin Laden, Al Qaeda, and the Taliban. When Elmaghraby was transported to court on the same day, officers subjected him to repeated strip searches and dragged him on the ground while he was chained and shackled, causing him to bleed from his legs.

Later that day, upon his return to the MDC, Elmaghraby was brought to the ADMAX SHU by elevator (the unit is on the ninth floor of the MDC). In the elevator, MDC officers verbally and physically assaulted him, causing him to bleed from the nose. Although the

officers carried a video camera with them, they turned it off while assaulting Elmaghraby.

On approximately December 1, 2001, while returning from recreation, Elmaghraby was pushed from behind by an MDC officer. He hit his face on a hard surface as a result, and broke his teeth.

2. *Iqbal*

Iqbal was transferred from the general population of the MDC to the ADMAX SHU on January 8, 2002. On that day, he was told by an officer that he had a legal visit. He was then taken to a room where 15 officers were waiting for him. Several of these officers picked Iqbal up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room. The officers screamed at Iqbal, that he was a "terrorist" and a "Muslim." Iqbal was then taken —shackled and chained around his arms, legs and waist, bleeding from his mouth and nose—to the ADMAX SHU.

On March 20, 2002, several MDC officers subjected Iqbal to three strip and body-cavity searches, all while he was in the same room. Although the officers had a hand-held video camera, they turned it off while conducting the searches. When the officers ordered Iqbal to submit to a fourth search, he protested. In response, one officer punched him in the face while another punched and kicked him in the back and legs. As a result, Iqbal bled from the mouth. While escorting Iqbal back to the ADMAX SHU, the officers continued to physically and verbally harass Iqbal, kicking him and making racist and threatening comments about Muslims. When they arrived at the SHU, the officers pulled Iqbal's arm through the slot in his cell door, causing him

excruciating pain. An officer then urinated in the toilet in Iqbal's cell and turned the water off so the toilet could not be flushed until the next morning.

D. *Strip and Body-Cavity Searches*

1. *Elmaghraby*

During the first three or four months of Elmaghraby's detention, he was strip searched every morning. MDC officers ordered him to take off his clothes and inspected him through the slot in the door before they entered the cell. In addition to these searches, Elmaghraby was strip and body-cavity searched six times on days he went to court—three times before going to court, and three times on his return. On such days, Elmaghraby would be searched first in his cell in the ADMAX SHU, then in a different room in the ADMAX SHU, and a third time on the ground floor of the MDC before going to court. Elmaghraby remained in the custody of MDC officers between the three searches. When Elmaghraby returned from court, the searches took place in reverse order. During these searches, Elmaghraby was ordered to pass his clothes to an officer and bend over while an officer used a flashlight to search his body cavities.[9]

While the strip and body-cavity searches were being conducted, Elmaghraby was threatened, verbally abused, and regularly pushed and shoved. On many occasions, the searches were conducted in an outrageous manner. Lieutenant Barrere once displayed Elmaghraby, naked, to a female MDC employee. On October 1,

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[9] These searches took place on October 1 and 2, November 5 and 8, and December 11, 2001; and January 8, February 12 and 13, and July 22, 2002.

2001, Barrere inserted a flashlight into Elmaghraby's anal cavity. Elmaghraby saw blood on the flashlight when it was removed. On two occasions (involving two different officers), an MDC defendant pushed a pencil into Elmaghraby's anal cavity during a search. Other officers were present during all of these searches.

2. *Iqbal*

Each morning, MDC officers first searched Iqbal's cell. During this search, he was chained and shackled, and he was routinely kicked and punched by the officers. After the cell was searched, the officers would conduct a strip and body-cavity search of Iqbal. In addition to these daily strip and body-cavity searches, Iqbal was subjected to three strip searches whenever he visited the medical clinic for treatment—one before the visit and two afterwards. On days he went to court, Iqbal was searched four times: in his cell at about 5:30 a.m. (as was done each morning); at about 7:40 a.m. on the first floor of the MDC; and twice on his return from court.[10]

Iqbal too was often searched in an outrageous manner. For example, as described above, on March 20, 2005, several MDC officers conducted three strip and body-cavity searches of Iqbal on a single occasion, and when he protested against a fourth, he was punched and kicked in response.

E. *Interference with Religious Practice*

During the entire time plaintiffs were confined in the ADMAX SHU, MDC officers constantly interfered with their religious practices and beliefs. Such interference

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[10] These searches occurred on February 19, March 6 and 20, and April 22, 2002.

included banging on plaintiffs' cells while they were praying, routinely confiscating their copies of the Koran, and refusing to permit plaintiffs to participate in Friday prayer services with fellow Muslims. When plaintiffs requested to join fellow Muslims for Friday prayers, officers made comments such as, "No prayer for terrorists," and "Why do you need to pray when you are in jail?" Elmaghraby complained about this interference to Hasty and Zenk, among others, and they refused to take any action to remedy the situation.

F. *Interference with Right to Counsel*

The MDC defendants deliberately interfered with plaintiffs' attempts to communicate with their criminal defense counsel. From October 1 to November 1, 2001, Corrections Officer Cotton, the ADMAX SHU counselor responsible for determining whether and when detainees were permitted visits or phone calls, prohibited Elmaghraby from speaking by telephone with his attorney. After November 1, 2001, Cotton stood near Elmaghraby when he spoke to his attorney by telephone, and disconnected the phone whenever Elmaghraby complained about the conditions of his confinement. When Elmaghraby's attorney tried to visit him, she often waited for hours without seeing him. When they were able to meet, a video camera recorded the visit, and when Elmaghraby returned to his cell, he would find that it had been ransacked. On these occasions, Elmaghraby would be strip searched after the legal visit even though the visit was non-contact,. [*sic*]

When Iqbal spoke to his attorney by telephone, Cotton would disconnect the phone if he complained about the conditions of his confinement. On several occasions, Iqbal's attorney was turned away from the MDC after

being falsely informed that Iqbal had been transferred to another facility. In addition, Defendant Shacks routinely delayed Iqbal's receipt of legal mail, sometimes by up to two months.

G. *Medical Care*

On December 1, 2001, Elmaghraby was shoved by an MDC officer into a hard object and broke his teeth. Nina Lorenzo, a physician's assistant, provided Elmaghraby with antibiotics for his injury, but they were confiscated by Lieutenant Ortiz when Elmaghraby returned to the ADMAX SHU. When Elmaghraby complained to Shacks about the confiscation, Shacks asked him why he needed his teeth. Plaintiffs also allege that Lorenzo misdiagnosed Elmaghraby's *hypothyroidism* as *asthma*. After Lorenzo prescribed *asthma* medicine, Elmaghraby's *hypothyroidism* became worse, and he had to undergo surgery as a result.

On March 21, 2002, the day after Iqbal was beaten by MDC officers, he requested medical assistance from Lorenzo. Shacks, however, told Lorenzo to leave the ADMAX SHU without providing any medical assistance, and Iqbal did not receive any medical care for two weeks after this assault, despite the fact that he was suffering excruciating pain.

H. *Personal Involvement*

Plaintiffs allege that all defendants were personally involved in creating or implementing the policy under which they were confined without recourse to procedures for challenging their confinement. Plaintiffs allege that defendants were not only aware of the conditions of their confinement, but agreed to subject plain-

tiffs to those conditions because of their race, religion, and national origin.

Plaintiffs allege that the physical and verbal abuse to which they were subjected, the unnecessary and abusive strip and body-cavity searches, the interference with religious practices, and the imposition of substantial restrictions on their ability to communicate with counsel were all components of a discriminatory policy for which high-level BOP and MDC officials bear personal liability. In general, plaintiffs assert that the BOP Defendants and the Wardens either (1) created or implemented these practices; (2) knew or should have known that their subordinates were engaging in the unlawful practices; or (3) knowing that these practices were taking place, failed to remedy them.

I. *Summary of Plaintiffs' Claims*

Plaintiffs bring the following claims:

1. The conditions of confinement in the ADMAX SHU, and the failure to take measures to remedy those conditions, violated their due process rights under the Fifth Amendment. Plaintiffs assert this claim against the Wardens and other MDC defendants.[11]

2. The policy of assigning plaintiffs to the ADMAX SHU without affording them the opportunity to chal-

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[11] Plaintiffs have withdrawn claims 1, 8, 12, and 13 against Lorenzo. *See* Opp'n Br. at 2 n. 2. Plaintiffs have also withdrawn claims 3, 4, 5, and 15 against Zenk. *See* letter from Alexander A. Reinert to the Court dated November 4, 2004; Opp'n Br. at 1 n. 1. Those claims against Lorenzo and Zenk are hereby dismissed.

lenge their continued administrative detention violated their due process rights under the Fifth Amendment. Plaintiffs assert this claim against Ashcroft, the FBI Defendants, the BOP Defendants, the Wardens, and other MDC defendants.

3-4. The intentional beatings to which plaintiffs were subjected, and the failure to take measures to prevent these beatings, violated plaintiffs' right to due process under the Fifth Amendment, and the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs assert these claim against Hasty and other MDC defendants.

5. The policy of interfering with plaintiffs' access to counsel violated plaintiffs' right to counsel under the Sixth Amendment. Plaintiffs assert this claim against Hasty and other MDC defendants.

6-7. The denial of adequate medical examination and care violated plaintiffs' right to due process under the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs assert these claims against Lorenzo and other MDC defendants.

8. The conditions of confinement that plaintiffs were subjected to in the ADMAX SHU, and the failure to take measures to remedy those conditions, violated the Eighth Amendment's prohibition against cruel and unusual punishment, Plaintiffs assert this claim against the Wardens and other MDC defendants.

9. The policy of subjecting plaintiffs to unreasonable strip and body-cavity searches, and the failure

to remedy such a policy, violated the Fourth Amendment's prohibition against unreasonable searches. Plaintiffs assert this claim against Hawk Sawyer, the Wardens, and other MDC defendants.

10. The policy of interfering with plaintiffs' religious practices, and the failure to remedy such a policy, violated plaintiffs' free exercise rights under the First Amendment. Plaintiffs assert this claim against the Wardens, and other MDC defendants.

11. The policy of subjecting plaintiffs to harsher conditions of confinement because of their religious beliefs, and the failure to remedy such a policy, violated plaintiffs' rights under the First Amendment. Plaintiffs assert this claim against Ashcroft, the FBI Defendants, the BOP Defendants, the Wardens, and other MDC defendants.

12. The policy of subjecting plaintiffs to harsher conditions of confinement because of their race, and the failure to remedy such a policy, violated plaintiffs' rights to equal protection under the Fifth Amendment. Plaintiffs assert this claim against all defendants.

13. The policy of subjecting plaintiffs to harsher conditions of confinement because of their religious beliefs, and the failure to remedy such a policy, substantially burdened their religious exercise, in violation of RFRA, 42 U.S.C. § 2000bb. Plaintiffs assert this claim against all defendants.

14. The policy of confiscating plaintiffs' religious materials, regularly interrupting their daily prayers,

and denying them access to Friday communal prayers, and the failure to remedy such a policy, substantially burdened plaintiffs' religious exercise and belief, in violation of RFRA. Plaintiffs assert this claim against the Wardens, and other MDC defendants.

15. By brutally beating and verbally abusing plaintiffs because of their religious beliefs, and by failing to take measures to remedy such abuse, defendants imposed a substantial burden on plaintiffs' religious exercise, in violation of RFRA. Plaintiffs assert this claim against Hasty and other MDC defendants

16-17. The agreements among various defendants to deprive plaintiffs of the equal protection and equal privileges and immunities of the laws because of their religious beliefs, race, and national origin violated the civil rights conspiracy statute, 42 U.S .C. § 1985(3). Plaintiffs assert that (1) Ashcroft, Mueller, the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessarily harsh conditions of confinement without due process; (2) the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; and (3) the Wardens and other MDC defendants agreed to substantially burden Elmaghraby's religious practice while he was housed in the ADMAX SHU.

18-20. The beatings of Iqbal and the failure to prevent those beatings; the negligent medical care Iqbal received; and the brutal conduct that caused him to suffer extreme and lasting emotional distress constitute torts for which Iqbal seeks compensatory dam-

ages from the United States pursuant to the FTCA, 28 U.S.C. § 2671 *et seq.*

21. The cruel, inhuman and degrading treatment plaintiffs were subjected to violated international law. Plaintiffs assert a claim for this violation under the Alien Tort Statute, 28 U.S.C. § 1350, against all defendants.

DISCUSSION

A. *The Motion to Dismiss Standard*

In considering a motion to dismiss under Rule 12(b)(6), a federal court is required to accept as true the factual assertions in the complaint and construe all reasonable inferences in favor of the plaintiff. *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992). Dismissal may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation omitted). Thus, a federal court's task in determining the sufficiency of a complaint is "necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The appropriate inquiry is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*; *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.") (internal quotation omitted).

B. *Personal Jurisdiction*

Those defendants who are not domiciled in New York State—Ashcroft, the FBI defendants, and the BOP defendants—have moved to dismiss under Rule 12(b)(2), asserting that this Court lacks personal jurisdiction over them.

Personal jurisdiction must be established under the law of the state where the federal court sits. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999); Fed. R. Civ. P. 4(k)(1)(A). Under New York's long-arm statute, a court may exercise jurisdiction over any non-domiciliary if "in person or through an agent," he "transacts any business within the state," or "commits a tortious act within the state" and the cause of action arises from those acts. *See* N.Y. C.P.L.R. § 302(a)(1), (2). The statute's purpose is to "extend the jurisdiction of New York courts over non-residents who have 'engaged in some purposeful activity [here] in connection with the matter in suit.'" *Padilla v. Rumsfeld*, 352 F.3d 695, 709 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004) (quoting *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457 (1965)). One transaction is sufficient to support jurisdiction under § 302 "so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988); *cf. Kronisch v. United States*, 150 F.3d 112, 130 (2d Cir. 1998) (there must be an "articulable nexus" between the defendant's actions and the asserted claim). Personal jurisdiction cannot be based solely on a defendant's supervisory position. *See Ontel Prods. Inc. v. Project Strategies Corp.*, 899 F.

Supp. 1144, 1148 (S.D.N.Y. 1995). Instead, a plaintiff must show that defendant "personally took part in the activities giving rise to the action at issue." *Id.*

Here, plaintiffs allege that defendants were personally involved in the creation or implementation of unconstitutional policies that were directed at the post-September 11 detainees confined in the ADMAX SHU of the MDC. Such personal involvement, if established, satisfies § 302(a)(1)'s requirement that there be a substantial relationship or nexus between the defendant's action and the asserted claim.

As a defense on the merits of plaintiffs' claims, defendants assert that they were not personally involved in the alleged unconstitutional activity. This defense overlaps with defendants' jurisdictional argument, that is, a lack of personal involvement precludes both liability on the merits and the assertion of personal jurisdiction. *See Richardson v. Goord*, 347 F.3d, 431, 435 (2d Cir. 2003) (mere linkage in the prison chain of command insufficient to confer liability for constitutional torts); *Nwanze v. Philip Morris Inc.*, 100 F. Supp. 2d 215, 220 (S.D.N.Y. 2000) ("Mere supervision over the Bureau of Prisons, the reach of which extends into every state, is insufficient to establish a basis for the exercise of personal jurisdiction.").

Accordingly, motions to dismiss for lack of personal jurisdiction are properly granted where plaintiffs have failed to sufficiently allege defendants' involvement in any of the alleged violations of plaintiffs' rights. Where such involvement is adequately alleged and discovery is required to determine the extent of personal involvement, such discovery will likewise resolve the jurisdictional question as well. *See Newbro v. Freed*, 2004 WL

691392, at *3 (S.D.N.Y. March 31, 2004) (discovery to resolve question of personal jurisdiction proper where plaintiff has "established that his jurisdictional position is not frivolous.").

C. *Qualified Immunity Generally*

The defendants seek dismissal of all claims against them on qualified immunity grounds. Government officials performing discretionary functions enjoy qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "As a general rule, [state actors] are entitled to qualified immunity of (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Oliveira v. Mayer*, 23 F.3d 642, 648 (2d Cir. 1994).[12]

Whether a right was clearly established at the relevant time is a question of law. *Kerman v. City of New York*, 374 F.3d 93, 108 (2d Cir. 2004). The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004) (internal quotation omitted). Accordingly, a court must determine the level of generality of the relevant legal rule. *Cf. Wilson v. Layne*, 526 U.S. 603, 615 (1999) (it "could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established' since it is clearly established that

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[12] The qualified immunity standard in *Bivens* cases is identical to the standard employed in cases brought under 42 U.S.C. § 1983. *See Wilson v. Layne*, 526 U.S. 603, 609 (1999).

the protections of the Fourth Amendment apply to the actions of police."). The precise act challenged need not have previously been held unlawful in order to defeat qualified immunity, but, its unlawfulness must be "apparent" in light of pre-existing law. *Id.* at 615; *cf. Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 129 (2d Cir. 2004) (the right in question "must not be restricted to the factual circumstances under which it has been established.").

In contrast to the "clearly established" law inquiry, "the matter of whether a defendant's official conduct was objectively reasonable, *i.e.*, whether a reasonable officer would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact." *Kerman*, 374 F.3d at 109. If there is a genuine dispute as to material historical facts, those must be resolved by the factfinder before the court can properly make the ultimate legal determination of whether the defense is available. *Id.*; *see also Poe v. Leonard*, 282 F.3d 123, 133 (2d Cir. 2002) ("if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendant's conduct under the circumstances, qualified immunity applies.") (internal quotation omitted).

The defense is not unavailable on a motion to dismiss. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). However, a defendant asserting qualified immunity in a pre-discovery motion faces a "formidable hurdle":

> Not only must the facts supporting the defense appear on the face of the complaint, but as with all 12(b)(6) motions, the motion may be granted only

> where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Thus, the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense.

Id. at 434, 443 (internal citations and quotation omitted).

1. *Allegations of Personal Involvement*

A government official may not be held liable for a constitutional tort under a theory of *respondeat superior*, instead, a plaintiff must establish that the official was personally involved in the alleged violations. *Richardson*, 347 F.3d at 435 (discussing supervisory liability in the context of a § 1983 claim); *see also Wilson*, 526 U.S. at 609 (explaining that the qualified immunity analysis under *Bivens* is identical to the analysis under § 1983); *Poe*, 282 F.3d at 134 (qualified immunity analysis depends upon an individualized determination of the misconduct alleged). Here, the parties disagree about how specific and "nonconclusory" an allegation of personal involvement must be in order to survive a motion to dismiss where the defense of qualified immunity has been asserted. This disagreement exposes a tension between the liberal pleading standards under the Federal Rules and one of the core purposes of qualified immunity—protecting public officials from the burdens of discovery against unmeritorious claims.

To survive a motion to dismiss, a plaintiff need only provide a statement that gives the defendant "'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *See Swierkiewicz*, 534 U.S. at 512 (quoting *Conley v. Gibson*, 355 U .S. 41, 47 (1957)). Rule

8(a)'s simplified pleading standard applies to "all civil actions, with limited exceptions," such as Rule 9(b)'s requirement that allegations of fraud and mistake be pleaded with particularity. *See id.* at 513. Thus, whether the allegations in a complaint are too conclusory to survive a motion to dismiss depends upon whether they meet the permissive standard set forth in Rule 8(a). The expectation that a defendant will assert qualified immunity as a defense does not elevate a plaintiff's pleading requirements. *See McKenna*, 386 F.3d at 434 (defendant asserting qualified immunity at 12(b)(6) stage faces "formidable hurdle").[13]

Defendants argue, however, that a plaintiff must allege a quantum of nonconclusory facts to survive a motion to dismiss. In support of this standard, they rely primarily on dicta in *Crawford-El* that in order to protect "the substance of the qualified immunity defense," a court may insist at the pre-discovery stage that a

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[13] In recent years, the Supreme Court has repeatedly rejected judicially-created heightened pleading standards in favor of the liberal notice-pleading requirement of Federal Rule of Civil Procedure 8(a). *See Swierkewicz*, 534 U.S. at 514-15 (rejecting a heightened pleading standard for employment discrimination); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993) (same; municipal liability under § 1983); *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1990) (plaintiff need not allege bad faith to state a claim against a public official who might be entitled to immunity if he acted in good faith); *cf. Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (rejecting heightened evidentiary standard for § 1983 cases alleging unconstitutional motive). In *Swierkewicz*, the Court reiterated that a requirement of greater specificity at the pleading stage "is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" 534 U.S. at 515 (quoting *Leatherman*, 507 U.S. at 168).

plaintiff put forward "specific, nonconclusory factual allegations." 523 U.S. at 598, 600. To the extent that this dicta suggests a heightened pleading requirement, such a requirement is foreclosed by *Swierkewicz*. *See, e.g., Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 65 (1st Cir. 2004) (although some courts post-*Crawford-El* required heightened pleading in civil rights cases in order not to erode the qualified immunity doctrine, "[w]hatever window of opportunity we thought remained open after *Crawford-El* has been slammed shut by the Supreme Court's subsequent decision in *Swierkiewicz*."); *cf. Phelps v. Kapnolas*, 308 F.3d 180, 186-87 (2d Cir. 2002) ("However unlikely it may appear to a court from a plaintiff's complaint that he will ultimately be able to prove an alleged fact such as mental state, the court may not go beyond FRCP 8(a)(2) to require the plaintiff to supplement his pleadings with additional facts that support his allegation of knowledge either directly or by inference.").

Second, while the *Crawford-El* Court stated that the question of qualified immunity should be resolved before permitting discovery, 592 U.S. at 598, it also recognized that such a pre-discovery determination may not be possible:

> [D]iscovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from *all* discovery. *Harlow* sought to protect officials from the costs of "broad-reaching" discovery, and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment on qualified immunity.

Id. at 592 n.14 (citation omitted); *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 793 (2d Cir. 2002) (ruling on qualified immunity defense premature where issue "turns on factual questions that cannot be resolved at [the motion to dismiss stage]"); *cf. Gomez*, 446 U.S. at 641 (whether qualified immunity has been established "depends on facts peculiarly within the knowledge and control of the defendant.").

Where the qualified immunity question cannot be resolved at the motion to dismiss stage, a court "should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible." *Crawford-El*, 523 U.S. at 600; *cf. Velez v. Levy*, 401 F.3d 75, 101 (2d Cir. 2005) (while defendant is not entitled to qualified immunity on motion to dismiss, the "factual basis for qualified immunity may arise as the proceedings develop."). The *Crawford-El* Court suggested ways for district courts to manage the process while attempting to protect officials from the burdens of litigation, such as limiting discovery under Federal Rule of Civil Procedure 26. 523 U.S. at 599-600; *see also Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring) ("If immunity doctrines require decisions without discovery (or with limited discovery), then district judges must use their authority under Rule 26(b)(2) and (c) to curtail or eliminate discovery and decide on the basis of affidavits and other evidence that can be produced without compulsory process. Immunity does not justify decision on the basis of allegations instead of evidence (which is what judgment under Rule 12 entails) or a pretense that

a complaint . . . doesn't state a claim on which relief may be granted.").

In sum, *Crawford-El*, *Swierkewicz*, and *McKenna* suggest the following principles when evaluating qualified immunity at the motion to dismiss stage: (1) a complaint must meet Rule 8(a)'s requirements: fair notice of the claims asserted and the grounds upon which they rest; (2) the plaintiff is entitled to all reasonable inferences from the facts alleged in the complaint, including those that defeat the immunity defense; (3) where there is a factual dispute bearing on the qualified immunity question, that dispute should be resolved at the earliest opportunity; and (4) to resolve such a dispute, it may be appropriate to limit discovery in scope (to issues that bear on the qualified immunity defense) and manner.

D. Bivens *Actions Generally*

In *Bivens*, the Supreme Court held that a private cause of action under the Constitution was available to recover damages against federal officers for violations of Fourth Amendment rights. 403 U.S. at 389. This cause of action was later extended to allow recovery for other constitutional violations. *See, e.g., Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (Fifth Amendment); *Carlson v. Green*, 446 U.S. 14, 20 (1980) (Eighth Amendment); *Bush v. Lucas*, 462 U.S. 367, 377-380 (1983) (refusing to allow a *Bivens* suit on the ground that Congress had created adequate alternative remedies, but generally recognizing the existence of such a cause of action for violations of the First Amendment). Courts generally treat *Bivens* claims as analogous to the cause of action created by 42 U.S.C. § 1983, which permits recovery for federal rights violations by state officials. *See Wilson*, 526 U.S. at 609 (qualified immunity analysis

identical for *Bivens* and § 1983 actions); *Butz v. Economou*, 438 U.S. 478, 498-99 (1978) (treating a *Bivens* claim as directly analogous to a § 1983 claim).

The Supreme Court has carved out two, potentially intersecting, exceptions to the availability of *Bivens* damages. A *Bivens* remedy is unavailable (1) "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," *Carlson*, 446 U.S. at 18-19 (emphasis in original); and (2) where there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* (internal quotation omitted); *see, e.g., United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (holding that the unique disciplinary structure of the military constituted "special factors counseling hesitation" such that no *Bivens* remedy "is available for injuries that arise out of or are in the course of activity incident to service") (internal quotation omitted); *Bush*, 462 U.S. at 388-89 (refusing to extend a *Bivens* claim to a federal employee in light of the comprehensive scheme Congress had established over the field of federal employment).

Ashcroft argues that there are special factors present here that militate against the availability of a remedy under *Bivens*. Specifically, he argues that (1) to the extent plaintiffs are challenging their detention pending removal, the immigration statutes provide a comprehensive remedial scheme; and (2) plaintiffs' claims arise within the context of the September 11 attacks and their aftermath.

I reject the contention that these features of the case constitute "special factors" militating against the

provision of a *Bivens* remedy. First, while many post-September 11 detainees were held on immigration charges, plaintiffs here were detained on criminal charges. They challenge their treatment as criminal defendants, and not their detention pending removal. Second, our nation's unique and complex law enforcement and security challenges in the wake of the September 11, 2001 attacks do not warrant the elimination of remedies for the constitutional violations alleged here. *Cf. Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) ("it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested."). This does not mean the context in which the challenged actions occurred is irrelevant. Rather, the qualified immunity standard takes that context into account, shielding officials from liability unless it is clear from preexisting law that the official's actions are unlawful under the circumstances. However, the qualified immunity

> standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: "Where an official could be expected to know that his conduct would violate statutory rights, he *should* be made to hesitate. . . ." *Harlow*, 457 U.S. at 819. This is as true in matters of national security as in other fields of governmental action.

Mitchell v. Forsyth, 472 U.S. 511, 524 (1985). The problems posed by issues of national security are not akin to

those posed by military service, where the need for a separate system of military justice precludes the provision of a *Bivens* remedy. *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *Stanley*, 483 U.S. at 683-84.

As in § 1983 actions, there is no *respondeat superior* liability in a *Bivens* action. *Cuoco v. Moritsugu*, 222 F.3d 99, 110 (2d Cir. 2000). To hold a supervisory official liable under § 1983 (and thus under *Bivens*), a plaintiff must show one or more of the following:

> (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring.

Richardson, 347 F.3d at 435; *see also Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 254 (2d. Cir. 2001). Mere linkage in the prison chain of command is insufficient to implicate a supervisory prison official. *Richardson*, 347 F.3d at 435.

With these general principles in mind, I turn to plaintiffs' claims in this case.

E. *Plaintiffs'* Bivens *Claims*

1. *Conditions of Confinement Claims*

a. *Substantive Due Process and Cruel and Unusual Punishment (Claims 1 & 8)*

Plaintiffs allege that the conditions of their confinement violated their substantive due process rights under

the Fifth Amendment and constitute cruel and unusual punishment under the Eighth Amendment. Wardens Hasty and Zenk contend that (1) the conditions of confinement did not violate plaintiffs' clearly established due process rights; and (2) plaintiffs have failed to allege sufficient personal involvement on the part of the Wardens in imposing those conditions to hold them liable under *Bivens* or to defeat their claims of qualified immunity.

The Due Process Clause protects pretrial detainees—persons who have been charged with a crime but have yet to be found guilty of the charge—from certain conditions and restrictions of pretrial detainment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Specifically, a pretrial detainee has the right to be free from punishment prior to an adjudication of guilt in accordance with due process of law.[14] *Id.* This does not mean, however, that a detainee may not be subject to significant restrictions. The maintenance of an institution's security and discipline are "essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546.

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[14] Once an inmate is sentenced he may be "punished," but that punishment may not be cruel and unusual. *Bell*, 441 U.S. at 535 n.16. To state a claim of unconstitutional conditions under the Eighth Amendment, an inmate must show that inhumane conditions were imposed with deliberate indifference. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991) ("deliberate indifference" standard articulated in *Estelle v. Gamble*, 429 U.S. 97 (1976), for a claim of inadequate medical care applies to claims of inhumane conditions of confinement). Here, the allegations concerning conditions of confinement stem largely from the period when plaintiffs were pretrial detainees. Elmaghraby was a pretrial detainee for almost 10 of the 11 months that he was confined in the ADMAX SHU; Iqbal was a pretrial detainee throughout the entire time he was confined in the ADMAX SHU.

Prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547. Thus, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, without more, amount to 'punishment.'" *Id.* at 539. Conversely, where a condition is not reasonably related to a legitimate goal, "a court permissibly may infer that the purpose of the governmental action is punishment." *Id.*

Warden Zenk argues that plaintiffs have failed to state a claim primarily because the alleged conditions were reasonably related to legitimate penological goals and thus did not amount to punishment. Zenk argues, for example, that (1) segregating Muslims in the aftermath of the September 11 attacks "served the important non-punitive purpose of protecting [post-September 11 detainees] from possible assault in the general prison population;" (2) strip and body-cavity searches ensure that detainees do not carry contraband into their cells (and the Supreme Court expressly validated visual body-cavity searches of pretrial detainees after contact visits, *see Bell* at 558-560); and (3) restricting toilet paper is justified because it can be used to set fires and clog toilets. *See* Zenk Br. at 16-19.

Plaintiffs do not contend, however, that legitimate security interests could never justify some of the conditions which they were subjected to, such as strip and body-cavity searches. Instead, they allege that they were subjected to harsh conditions of confinement for purely punitive reasons. These conditions included:

verbal and physical abuse; purposeless and abusive strip and body-cavity searches; the denial of access to basic medical care and hygiene; the denial of proper exercise; and confinement in solitary confinement with the lights on almost 24 hours per day.

In short, while defendants posit legitimate reasons that might justify the conditions in the ADMAX SHU, plaintiffs assert illegitimate reasons for those conditions. A restriction or condition that under some circumstances has a legitimate justification cannot be inflicted upon detainees where no such justification exists. *See Bell*, 441 U.S. at 539 (where a restriction or condition is arbitrary or purposeless, a court may infer that the purpose of the governmental action is punishment). Here, the determination whether the conditions imposed upon plaintiffs were legitimate or punitive is not amenable to resolution on a motion to dismiss. In this procedural setting, I assume the truth of plaintiffs' allegations and draw all inferences in their favor. While a court will normally defer to a prison administrator's expert judgment on security matters, *see Bell*, 441 U.S. at 540 n.23, such deference is inappropriate "where there is substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." *Id.*; *cf. United States v. Gotti*, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) ("due deference does not mean blind deference"). Without such a record, a court may not be able to determine the reasonableness or legitimacy of an allegedly punitive condition of confinement. *See Bell* at 541-63 (evaluating reasonableness of restrictions, including strip searches conducted after contact visits, on a full evidentiary record). The cases cited by Zenk to support the legitimacy of the conditions of the ADMAX SHU are not to the contrary. *Morreale v.*

Cripple Creek, 113 F.3d 1246 (table), 1997 WL 290976 (10th Cir. May 27, 1997) (unpub. op.) (decision on summary judgment); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (same); *Davenport v. DeRobertis*, 844 F.2d 1310 (10th Cir. 1988) (decision after full trial); *Hay v. Waldron*, 834 F.2d 481 (5th Cir. 1987) (review of denial of preliminary injunction); *Goff v. Nix*, 803 F.2d 358 (8th Cir. 1987) (review of grant of permanent injunction).

(i) *Personal Involvement*

The Wardens argue that plaintiffs have failed to allege sufficient personal involvement in the violation of their due process rights to state a *Bivens* claim or defeat a defense of qualified immunity. Hasty argues, for example, that the conditions of confinement claims are premised on supervisory liability, and that plaintiffs allege only "the most attenuated, superficial connection between Hasty's supervisory responsibilities at MDC and the alleged conduct of his subordinates." Hasty Reply Br. at 1-2.

The Wardens elide the difference between vicarious liability under the doctrine of *respondeat superior* (which is not available under *Bivens*) and the liability of a supervisor based on his own actions or inactions). Hasty's argument that he "had no meaningful contact with Plaintiffs" during their confinement, *see* Reply Br. at 1, misapprehends the type of personal involvement that must be alleged to state a claim of supervisory liability. An allegation, for example, that a supervisor was aware of a constitutional violation but took no action to remedy it may be sufficient to state a claim. *See Johnson*, 239 F.3d at 255 (denying motion to dismiss asserting qualified immunity where plaintiff alleged that supervisors failed to act on "information that unconstitu-

tional acts were occurring" at the hands of subordinates); *McKenna*, 386 F.3d at 437 (allegation that prison superintendents allowed the continuation of unlawful policies sufficient to defeat assertion of qualified immunity at motion to dismiss stage); *cf. Richardson*, 347 F.3d at 435 (supervisors may be liable for, among other things, creation of a policy that sanctioned unconstitutional conduct, grossly negligent supervision, or failure to act on information indicating that unconstitutional conduct was occurring).

Plaintiffs allege, among other things, that both Wardens were aware of the abusive conditions of the ADMAX SHU and allowed plaintiffs to be subjected to those conditions for purely punitive reasons. The Wardens contend otherwise, but that dispute may properly be resolved only on summary judgment or at trial.[15]

b. *Procedural Due Process (Claim 2)*

Plaintiffs allege that Ashcroft, the FBI Defendants, the BOP defendants, and the Wardens, among others, violated their right to due process by creating or implementing a policy of confining plaintiffs in highly restric-

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[15] Zenk argues that all claims against him should be dismissed because "substantially all" of the specific allegations of abuse are alleged to have occurred before he became warden on April 22, 2002. Zenk Reply Br. at 2. Plaintiffs concede that certain conditions—specifically the denial of basic hygiene items and inadequate lighting—took place prior to Zenk's tenure, and they do not assert claims against Zenk on those grounds. Plaintiffs allege, however, that Zenk was personally involved in subjecting plaintiffs to unconstitutional conditions of confinement and for failing to remedy those conditions. Zenk cannot, of course, be held liable for acts that occurred prior to his becoming warden. The extent of his personal involvement, if any, in the conditions alleged during the period he was warden is a matter for discovery.

tive conditions without making individual determinations as to the appropriateness of such confinement and without allowing plaintiffs to challenge their continued detention under those conditions. Defendants argue that they are entitled to qualified immunity because (1) there was no violation of a constitutionally protected right because plaintiffs cannot establish a protectable liberty interest; and (2) if there was a protectable liberty interest, it was not clearly established in the aftermath of the September 11 attacks; and (3) in any event, the defendants' actions were objectively reasonable. They also contend that plaintiffs have failed adequately to allege their personal involvement in the charged conduct.

(i) *Whether a Protectable Liberty Interest Existed*

In determining whether a prisoner has stated a claim for a procedural due process violation, a court evaluates: "(1) whether the plaintiff had a protected liberty interest in not being confined and, if so, (2) whether the deprivation of that liberty interest occurred without due process of law." *Tellier v. Fields,* 280 F.3d 69, 79-80 (2d Cir. 2000) (internal quotation and ellipsis omitted). Plaintiffs allege that they received no process at all with regard to their continued detention in the ADMAX SHU. Thus, the issue here is whether they assert a protectable interest. In *Tellier,* the plaintiff was held in a Special Housing Unit at the Metropolitan Correction Center ("MCC")[16] because he was considered a flight risk. *Id.* at 74. He remained in the SHU for 514 days without an opportunity to be heard regarding his continued confinement in segregated housing. *Id.* The defen-

[16] The MCC is the federal detention facility in Manhattan. The MDC, the facility in which plaintiffs were detained, is in Brooklyn.

dants, including the MCC's former and current wardens, moved to dismiss for failure to state a claim and for summary judgment based on qualified immunity. *Id.* at 73, 79. The Second Circuit held that Tellier had a protectable liberty interest because (a) the alleged SHU conditions were "atypical and significant";[17] and (b) the interest in not being subjected to those conditions was created by BOP regulations setting forth mandatory procedures to be followed whenever a prisoner was subjected to segregated housing.[18] *Id.* at 80-81.

As in *Tellier*, plaintiffs here have satisfied both requirements for establishing a protectable liberty interest. First, the highly restrictive ADMAX SHU conditions are "atypical and significant" in comparison to the conditions faced by prisoners in the general population. *See id.* at 80 (where plaintiff has alleged confinement "under conditions that differ markedly from those in the general population, . . . we cannot conclude as a matter of law that this confinement was not 'atypical and significant.'"). Second, the government "has created a liberty interest by statute or regulation." *Id.* at 81. BOP regulations, codified at 28 CFR § 514.22, require

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[17] Tellier alleged that the MCC conditions to which he was subjected to included: being confined to his cell for 23 hours per day (as opposed to six or seven hours per day for inmates in the general population), less access to the telephone, showers, recreation area and law library than general population inmates, and being handcuffed whenever removed from the cell. 280 F.3d at 74.

[18] The initial decision to place a prisoner in a SHU is discretionary under BOP regulations, and thus there is no protected liberty interest associated with that decision. *Tellier*, 280 F.3d at 82. To the extent that plaintiffs here are alleging a denial of due process based upon their initial assignment to the ADMAX SHU, that portion of the claim is dismissed. *See id.*

individualized determinations concerning the appropriateness of continued segregation.[19] *See id.* at 83 (§ 541.22 contains mandatory language that gives rise to a state-created right that requires a factual determination of the nature of confinement). The regulations also set forth the bases for administrative detention:

> Administrative detention is to be used only for short periods of time except where an inmate needs long-term protection (see § 541.23), or where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns. An inmate may be kept in administrative detention for longer term protection only if the need for such protection is documented by the SRO. Provided institutional security is not compromised, the inmate shall receive at each formal review a written copy of the SRO's decision and the basis for this finding. The SRO shall release an inmate from administrative detention when reasons for placement cease to exist.

28 CFR § 514.22(c).

I reject Hawk Sawyer's argument that the statute does not create a protectable interest because § 541.22 is "designed to allow continued segregation, with fewer procedural protections, for a continuing complex investigation and/or security concerns." Hawk Sawyer Br. at[]

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[19] 28 CFR § 514.22(c) provides in part that: "[T]he Segregation Review Official will review the status of inmates housed in administrative detention. The SRO . . . shall hold a hearing and formally review the status of each inmate's placement in administrative detention, . . . and shall hold a hearing and review these cases formally at least every 30 days. The inmate appears before the SRO at the hearing unless the inmate waives the right to appear."

12. While administrative detention may be used in the context of a complex investigation, the regulations do not suggest that under such circumstances an inmate may be denied all process while confined under highly restrictive conditions for over ten months.

In addition, defendants assert that administrative segregation was proper to protect plaintiffs from assault in the general population. Such an assertion does not, however, eliminate an inmate's right to due process. *See* 28 C.F.R. § 541.23(b) ("Inmates who are placed in administrative detention for protection, but not at their own request . . . are entitled to a hearing, no later than seven days from the time of their admission.").

Defendants further argue that the context of plaintiffs' detention provided legitimate rationales for not following BOP procedures. Ashcroft argues that the post-September 11 context extinguishes any rights otherwise conferred by § 541.22: "Regulations written in peacetime cannot circumscribe the government's discretion at a time of national emergency from foreign threats." Ashcroft Mem. at 15. This proposition, which suggests that, as a matter of law, constitutional and statutory rights must be suspended during times of crisis, is supported neither by statute nor the Constitution. *Cf. Hamdi*, 124 S. Ct. at 2648 ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.") (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional

history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action.")).

In addition, Ashcroft asserts that: (1) "high interest" detainees presented unprecedented security concerns; (2) "persons connected with terrorist activities . . . could provide Al Qaeda essential information about the scope of the government's investigation that could be gleaned simply from the identity of those detained and those who had not been found," and (3) disclosing information underlying the FBI's investigation to plaintiffs during hearings could compromise the FBI's investigation. *See* Ashcroft Br. at 12-13. These arguments may eventually prove persuasive. As discussed below, however, the inquiry into what actions defendants took and the reasonableness of those actions in the aftermath of the September 11 attacks is not one that can be made on a motion to dismiss.

(ii) *Whether Plaintiffs' Right Was Clearly Established*

Defendants argue that even if the complaint states a due process violation, they are entitled to qualified immunity because the right was not defined with reasonable specificity at the time the challenged actions were taken.

There is little dispute that the right to due process for a detainee held in administrative detention was clearly established as of September 10, 2001. In November 2000, the Second Circuit held in *Tellier* that under BOP regulations, an inmate's right to process when held in atypically restrictive detention was clearly estab-

lished, and that "it [was] simply unreasonable for any official to believe" that § 541.22 permitted a detainee to be kept in the SHU for 514 days without a hearing. *Id.* at 85; *see also Wright v. Smith*, 21 F.3d 496, 500 (2d Cir. 1994) ("prison officials [could not] doubt that they have acted unconstitutionally where confinement . . . continued, without a hearing, for 67 days.").

The September 11 attacks placed an enormous burden on law enforcement and created unprecedented challenges for policy makers and their subordinates. *See generally* the April 2003 OIG Report. These events affected both the contours of detainees' due process rights and the objective reasonableness of the defendants' actions. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (internal quotation omitted); *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) ("terrorism or other special circumstances" may provide special arguments for preventive detention and for "heightened deference to the judgments of the political branches with respect to matters of national security"). I reject, however, the argument that the post-September 11 context wholly extinguished, as a matter of law, a pretrial detainee's due process rights for almost a year while subjected to highly restrictive confinement because he had been flagged as "of interest" to the government's ongoing investigation.

Plaintiffs are not complaining of a brief deprivation of process in the immediate aftermath of September 11, but one that continued for more than 8 months in Iqbal's case and nearly 11 months in Elmaghraby's. Indeed, Judge Glasser stated in February 2002 (approximately

four months after Elmaghraby entered the ADMAX SHU) that "it appears that [Elmaghraby's] constitutional rights have been violated as to being housed in a special unit at MDC." *See USA v. Elmaghraby,* Docket No. 01-cr-1175, Docket Entry No. 42 (February 12, 2002 status conference entry).

(iii) *Objective Reasonableness of Defendants' Acts*

Defendants argue that they acted reasonably under the circumstances, and thus are entitled to qualified immunity. Generally, the question whether a defendant acted reasonably is a factual inquiry which is not amenable to resolution at the motion to dismiss stage. *See e.g., Johnson v. Meachum,* 839 F. Supp. 953, 958 (D. Conn. 1993) (Cabranes, C.J.) ("Whether the defendants can establish that their alleged conduct was nevertheless 'objectively reasonable' is a question which has its principal focus on the particular facts of the case," and thus resolution is inappropriate on a motion to dismiss where a court has no factual record before it.) (internal quotation omitted).

Here, there are factual disputes concerning the nature of the defendants' actions and the need for those actions in light of the investigative and security concerns at the time. Indeed, as discussed below, some defendants dispute that they were personally involved in the alleged deprivation of process at all. In these circumstances, the objective reasonableness of defendants' actions is a question that, in my view, is properly addressed only on a motion for summary judgment. *See McKenna,* 386 F.3d at 436.

(iv) *Personal Involvement*

Defendants argue that the allegations of their personal involvement are too conclusory to defeat their claims of qualified immunity. For the reasons discussed above concerning the substantive due process claims, plaintiffs have sufficiently alleged the personal involvement of the Wardens. Whether they have alleged sufficient facts concerning Ashcroft, the FBI Defendants or the BOP defendants presents a closer question.

Generally, the assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim. *See Nuclear Transp. & Storage, Inc. v. United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) ("If a mere assertion that a former cabinet officer and two other officials acted to implement, approve, carry out, and otherwise facilitate alleged unlawful policies were sufficient to state a claim, any suit against a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial.") (internal quotation omitted) (footnote omitted). Here, however, the post-September 11 context provides support for plaintiffs' assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process. *See generally* the April 2003 OIG Report.[20] In addition, plaintiffs

[20] The April 2003 OIG report, which discusses the detention of aliens held on immigration violations after September 11, 2001, suggests the involvement of Ashcroft, the FBI Defendants, and the BOP Defendants in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involve-

have alleged that defendants were aware of the atypically restrictive conditions of their lengthy confinement. *See Richardson*, 347 F.3d at 435 (supervisory liability under *Bivens* may be shown by "creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue," or by the "failure to act on information indicating that unconstitutional acts were occurring.").

In addition, some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved.

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ment in terrorist activities. *See, e.g.*, 37-38 (Stuart Levey, an Associate Deputy Attorney General, stated that "the idea of detaining September 11 detainees until cleared by the FBI was 'not up for debate.' He said he was not sure where the policy originated, but thought the policy came from 'at least' the Attorney General."); 39 (Daniel Levin, Counselor to the Attorney General, "described a 'continuous meeting' for the first few months after the terrorist attacks involving the Attorney General, Deputy Attorney General, FBI Director, and [then Assistant Attorney General Michael] Chertoff, and said he was sure that the issue of holding aliens until they were cleared was discussed."); 112 ("MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's 'call.' "); 113 ("Rardin . . . directed wardens in his region not to release inmates classified by the BOP as 'terrorist related' from restrictive detention in SHUs until further notice."); 116 ("Cooksey's October 1, 2001 memorandum . . . directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible" until cleared by the FBI); 42, 49, 60 (mentioning Rolince and Maxwell's roles in the clearance process) and 69-71 (criticizing the pace of the FBI clearance process, the "indiscriminate and haphazard manner in which the labels of 'high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism," and explaining that the delays in clearing detainees had "enormous ramifications" for those detainees).

Ashcroft states, for example, that the MDC officials were not responsible: "BOP's decision to place detainees in administrative segregation under § 541.22(a) until cleared by the FBI was driven by national security and foreign threat concerns which wardens and prison officials were in no position to second guess." Br. at. 13. Rolince argues that it was the BOP's decision, and not the FBI's, to detain plaintiffs in the ADMAX SHU, and there are "no nonconclusory factual allegations that Rolince . . . was personally aware that the BOP relied upon the FBI clearance process in designating plaintiffs to more restrictive housing units within the MDC." Rolince Br. at 4-5. For their part, the BOP defendants contend that they were not responsible, either. Cooksey states, for example, that the MDC defendants exercised independent judgment that "breaks the chain of causation" between the alleged deprivations and his actions. Cooksey Br. at 10.[21] *See also* fn.20, *supra.*

Plaintiffs should not be penalized for failing to assert more facts where, as here, the extent of defendants' involvement is peculiarly within their knowledge. *See Gomez*, 446 U.S. at 641. Plaintiffs have alleged sufficient facts to warrant discovery as to the defendants' involvement, if any, in a policy that subjected plaintiffs to lengthy detention in highly restrictive conditions while being deprived of any process for challenging that detention.

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[21] As discussed in footnote 2, "the BOP Defendants" is used here to refer to the defendants who were upper-level managers of that agency (Hawk Sawyer, Cooksey and Rardin), as distinct from the facility-based defendants (the Wardens and the MDC Defendants).

(v) *Discovery*

The issue of qualified immunity should be addressed at the earliest appropriate stage. Where, as here, there are factual disputes that bear on the availability of the defense, discovery may be structured accordingly. *See Crawford-El,* 523 U.S. at 599-600. Rule 26 of the Federal Rules of Civil Procedure "vests the trial judge with broad discretion to tailor discover narrowly and dictate the sequence of discovery." *Id.* The personal involvement, if any, of the non-MDC defendants should be the subject of the initial stage of discovery. Accordingly, discovery concerning Ashcroft, the FBI Defendants (Mueller, Maxwell, and Rolince), and the BOP Defendants (Sawyer, Cooksey, and Rardin) will be generally limited to inquiries into their involvement in the alleged denials of due process. Appropriate topics will include whether the individual defendant participated in the creation and implementation of the policy or policies under which plaintiffs were detained, whether he or she had knowledge of the conditions under which plaintiffs were detained, and the defendant's involvement in or knowledge of the clearance process and the alleged bypassing of BOP procedures for challenging administrative segregation of pretrial detainees. Any dispute about the precise form(s) and scope of discovery shall be resolved by Judge Gold. Once he determines that discovery related to the issue is completed, defendants may file a properly supported motion for summary judgment.

2. *Excessive Force (Claims 3 and 4)*

Plaintiffs allege that they were physically abused by MDC officers, and that Warden Hasty, among others, failed to take reasonable measures to prevent or remedy this abuse in violation of the Fifth and Eighth Amend-

ments. For the reasons discussed above in connection with plaintiffs' due process claims, I reject Hasty's argument that plaintiffs do not adequately allege his personal involvement in the alleged deprivations of plaintiffs' rights.

Hasty's motion to dismiss claims 3 and 4 is denied.

3. *Interference with Right to Counsel (Claim 5)*

Plaintiffs allege that Warden Hasty, among others, interfered with plaintiffs' right to counsel in violation of the Sixth Amendment. The unreasonable interference with an accused person's ability to consult counsel violates the Sixth Amendment. *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001). The right to counsel attaches "at or after the initiation of adversary judicial proceedings," whether by way of "indictment, information, or arraignment." *See Kirby v. Illinois*, 406 U.S. 682, 689 (1972). In evaluating whether a pretrial detainee's right to counsel was impaired, a court must determine whether the restrictions imposed unjustifiably obstructed the right of access to counsel or to the courts "in the light of the central objective of prison administration, safeguarding institutional security." *Benjamin*, 264 F.3d at 87 (internal quotation marks omitted).

Plaintiffs allege that while detained in the ADMAX SHU, MDC defendants substantially interfered with plaintiffs' ability to communicate with counsel by, among other things, preventing Elmaghraby from speaking over the telephone with his attorney for almost two months; subsequently disconnecting the phone when plaintiffs complained about the conditions of their confinement; videotaping Elmaghraby's meetings with his attorney; ransacking Elmaghraby's cell while he met with his attorney; subjecting Elmaghraby to strip sear-

ches after non-contact visits with his attorney; preventing Iqbal from meeting with his attorney by falsely telling the attorney that Iqbal had been transferred out of the MDC; and routinely delaying Iqbal's receipt of legal mail. Plaintiffs allege that this interference with counsel was pursuant to a discriminatory policy, and that Hasty and other defendants knew of this interference and did nothing to remedy it.

Hasty contends that plaintiffs' claim fails because they did not state in their complaint that adversarial judicial pleadings had been initiated such that the right to counsel would attach. Hasty contends that by leaving this critical fact out of their complaint, plaintiffs have "sandbagged" Hasty, who had apparently been operating under the assumption that plaintiffs were "held in mere administrative detention until their release." Hasty Br. at 9. Plaintiffs assert that this Court may take judicial notice of Elmaghraby and Iqbal's arraignment dates (October 1, 2001 and November 5, 2001 respectively).

While the complaint could have been more transparent regarding plaintiffs' status as pretrial detainees facing criminal charges, it states that plaintiffs were arrested, held in the MDC after their arrest, transported to court on numerous occasions, and interfered with when they sought to communicate with their "criminal defense" attorneys. Such statements were sufficient to alert Hasty to the allegation that plaintiffs were not being held in mere administrative detention. Hasty's motion to dismiss this claim is denied.

4. *Denial of Medical Treatment (Claims 6 and 7)*

Plaintiffs allege that they were denied adequate medical treatment in violation of the Fifth and Eighth

Amendments. Defendant Nina Lorenzo, a physician's assistant at the MDC while plaintiffs were confined there, contends that (1) plaintiffs fail to state a claim; and (2) she is entitled to qualified immunity.

To state a cause of action under the Eighth Amendment for denial of medical care, a plaintiff must allege that a defendant has exhibited deliberate indifference to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).[22] The deliberate indifference standard incorporates both an "objective" prong—that the alleged deprivation be sufficiently serious—and a "subjective" prong—that the defendant acted with "a sufficiently culpable state of mind." *Hathaway v. Coughlin*, 37 F.3d, 63, 66 (2d Cir. 1994) (*"Hathaway I"*).

a. *Objective Test*

There is "no settled, precise metric" for determining whether a prisoner's condition is "sufficiently serious" such that liability under the Eighth Amendment may

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[22] The standard for alleging a due process violation grounded in the denial of adequate health care may be less rigorous than the Eighth Amendment standard. *See Bryant v. Maffucci*, 923 F.2d 979, 983 (2d Cir. 1991) ("Although a pretrial detainee's due process rights to adequate medical treatment are at least as great as the Eighth Amendment protections available to prison inmates, the Supreme Court has left unresolved what standard applies." (citation omitted)). Courts, however, have applied the same analysis to both claims. *See Davis v. Reilly*, 324 F. Supp. 2d 361, 367 (E.D.N.Y. 2004) (regardless of the "academic distinction," standard for analyzing pretrial detainee's due process claim is same as the standard under the Eighth Amendment); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (applying Eighth Amendment deliberate indifference test to pretrial detainee's claim under the Due Process Clause of the Fifth Amendment). Because I find that plaintiffs state an Eighth Amendment claim, I need not determine here whether there is a less rigorous for stating a due process claim.

attach. *See Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003). Factors courts consider include whether a reasonable doctor would perceive the medical need in question as worthy of treatment; whether the condition significantly affects daily activities; and whether the condition results in chronic and substantial pain. *Id.*

Plaintiffs allege that (1) after Elmaghraby was pushed into a hard surface and broke his teeth, Lorenzo provided Elmaghraby with antibiotics, but those antibiotics were confiscated by Lieutenant Ortiz upon Elmaghraby's return to the ADMAX SHU; (2) after Lorenzo misdiagnosed Elmaghraby's *hypothyroidism* as *asthma*, the condition worsened, and Elmaghraby had to undergo surgery; and (3) after a severe beating by MDC officers, Iqbal requested medical assistance from Lorenzo, but she was told by Shacks, the Unit Manager, to leave the ADMAX SHU without providing medical assistance; Iqbal did not receive any medical care for two weeks after the assault, despite suffering from excruciating pain. The latter two allegations—which are the grounds upon which plaintiffs' claims against Lorenzo are based—state a sufficiently serious condition to satisfy the objective test. *See id.* ("the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain." (internal quotation omitted).

b. *Subjective Test*

Under the subjective test, deliberate indifference requires more than negligence: "a prison official does not act in a deliberately indifferent manner unless that official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts

from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Hathaway I*, 37 F.3d at 66 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Defendants argue that plaintiffs allege, at most, negligence. *See Hathaway v. Coughlin*, 99 F.3d, 550, 553 (2d Cir. 1996) ("*Hathaway II*") ("'mere medical malpractice' is not tantamount to deliberate indifference"). In particular, defendants assert that because Lorenzo made some efforts to treat plaintiffs (i.e., prescribing antibiotics and (erroneously) *asthma* medicine; and reporting to the ADMAX SHU to provide medical services to Iqbal), the allegations demonstrate direct attention to plaintiffs' needs which negate a possible finding of indifference. *See McGann v. Coombe*, 1997 WL 88719, *2 (E.D.N.Y. 1997) (prescription of improper gout medicine shows attention and not indifference to prisoner's needs). In addition, defendants argue that because plaintiffs allege that Shacks instructed Lorenzo to leave the ADMAX SHU without providing medical assistance to Iqbal, the claim must fail unless plaintiffs' can demonstrate a duty on Lorenzo's part to disregard or override Shacks's directions.

As demonstrated by virtually all of the cases cited by Lorenzo, determining whether her conduct is actionable will require some discovery. *See, e.g., Richardson*, 347 F.3d 431 (deciding issue on summary judgment); *Hernandez v. Keane*, 341 F.3d 137 (2d Cir. 2003) (affirming grant of judgment as a matter of law after jury trial); *see also Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002) (allegation that prison officials knew that diet was inadequate and likely to inflict pain and suffering sufficiently pleads the subjective element of the deliberate indifference test); *cf.* Fed. R. Civ. P. 9(b) ("Malice, in-

tent, knowledge, and other conditions of mind of a person may be averred generally."). Plaintiffs' allegations that Lorenzo was deliberately indifferent when she misdiagnosed Elmaghraby and failed to treat Iqbal (albeit after being instructed not to provide treatment at the ADMAX SHU) are sufficient to state a claim.

The deliberate indifference standard for a prisoner's Eighth Amendment claims was clearly established during the period of plaintiffs' confinement at the MDC in 2001 and 2002. *See Estelle,* 429 U.S. at 106. Lorenzo asserts that plaintiffs have not shown "that she should reasonably have known that her conduct fell short of meeting her legal duties" under that standard, and thus she is entitled to qualified immunity. Reply Br. at 6. Although Lorenzo may ultimately prevail on that ground and others as well, it is too early to make the determination. What Lorenzo knew; whether she in fact made a misdiagnosis; if so, whether it was mere negligence; whether she was bound to follow Shacks's direction; and whether she acted reasonably under the circumstances are among the questions that cannot be resolved at this early stage. Lorenzo's motion to dismiss Claims Six and Seven is therefore denied.

5. *Unreasonable Searches (Claim 9)*

Plaintiffs allege that they were subjected to unreasonable strip and body-cavity searches in violation of the Fourth Amendment. Specifically, they allege that there was a policy under which (1) they were subjected to daily strip and body-cavity searches for no legitimate penological reason and without reasonable suspicion; and (2) they were searched multiple times whenever transported to court or the medical department, despite remaining in continuous custody from one search to the

next. They further allege that Hawk Sawyer, Hasty, and Zenk were either instrumental in establishing the search policy or, knowing that the searches were being conducted in an unconstitutional manner, failed to prevent or remedy the practice.

Defendants contend that plaintiffs fail to state a violation of a clearly established right because the searches at issue served the legitimate goal of ensuring that detainees were not in possession of dangerous or unlawful contraband. They further assert that plaintiffs fail to sufficiently allege their personal involvement.

a. *The Legal Standard*

The Fourth Amendment prohibits "unreasonable" searches, "a somewhat amorphous standard whose meaning varies with the context in which a search occurs and the circumstances of the search." *N.G. v. Connecticut*, 382 F.3d 225, 230 (2d Cir. 2004). The Supreme Court has held that a policy of subjecting pretrial detainees to strip searches after contact visits did not violate the Fourth Amendment, *see Bell*, 441 U.S. at 546, but "*Bell* did not 'read out of the Constitution the provision of general application that a search be justified as reasonable under the circumstances.'" *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (quoting *Weber v. Dell*, 804 F.2d 796, 800 (2d Cir. 1986); *see also Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992) (pretrial detainees retain a limited right to bodily privacy, and thus have the right to be free from bodily searches that are unreasonable under the circumstances of their confinement); *cf. N.G. v. Connecticut*, 382 F.3d at 238 (Sotomayer, J., dissenting in part) ("Our caselaw consistently has recognized the severely intrusive nature of strip searches and placed strict limits on their use.").

The Second Circuit has evaluated the constitutionality of strip and body-cavity searches under two different tests: the *Covino/Turner* reasonable relation test and the *Shain/Weber* reasonable suspicion test. Here, plaintiffs assert that *Shain/Weber* provides the applicable standard, while Hawk Sawyer contends that plaintiffs' claim should be analyzed under the *Covino/Turner* reasonable relation standard. I agree with Hawk Sawyer.

In *Covino,* the Second Circuit evaluated whether a prison regulation permitting random visual body-cavity searches of a pretrial detainee violated the Fourth Amendment by analyzing whether the regulation was "reasonably related to legitimate penological interests." 967 F.2d at 75, 78. In making such a determination, the Second Circuit applied the four-factor test set forth in *Turner v. Safley,* 482 U.S. 78 (1987): "(i) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (ii) whether there are alternative means of exercising the right in question that remain open to prison inmates; (iii) whether accommodation of the asserted constitutional right will have an unreasonable impact upon guards and other inmates . . . ; and (iv) whether there are reasonable alternatives available to the prison authorities." *Covino,* 967 F.2d at 78-79 (citing *Turner,* 482 U.S. at 89-90). The *Covino* Court held that a random visual body-cavity search policy was not an unreasonable regulation, and affirmed the denial of a motion for a preliminary injunction. *Id.* at 80. The Court noted, though, that plaintiff's claim had not been dismissed because "it was not clear from the testimony at the preliminary injunction hearing whether the search procedure was being applied in a purely random

manner or if the searches were intended to harass, intimidate, or punish [the inmate]". *Id.* at 80.

In *Shain,* the Second Circuit reviewed its cases on the constitutionality of searching persons charged with misdemeanors,[23] and held that, in light of those decisions, "no law enforcement officer reasonably could have believed that it was permissible to perform [a strip search on an individual arraigned on misdemeanor charges] absent individualized reasonable suspicion." *Shain,* 273 F.3d at 59. *Shain* delineated a bright line between a prison, where convicted felons are housed, and a jail, "a place where persons awaiting trial or those convicted of misdemeanors are confined." *Id.* at 65 (internal quotation omitted). In a prison, the appropriate test for determining the constitutionality of a search policy was the *Covino/Turner* reasonable relation test. *Id.* at 65-66. In a jail, on the other hand, the determination should be made by whether there was reasonable suspicion for the search. *Id.*

Plaintiffs argue that the MDC is the federal equivalent of a jail, and thus the clearly established applicable law is *Shain/Weber* (*Shain* was decided on October 19, 2001). I conclude, however, that plaintiffs are much more closely situated to the pretrial detainee held in prison in *Covino* than the misdemeanants and minor offenders of *Shain/Weber.* The MDC holds both

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[23] Those cases are *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986) (holding that the Fourth Amendment precludes prison officials from performing strip/body-cavity searches of arrestees charged with misdemeanors absent reasonable suspicion that the arrestee is concealing contraband); *Walsh v. Franco,* 849 F.2d 66 (2d. Cir. 1988) (reaffirming *Weber*); and *Wachtler v. County of Herkimer,* 35 F.3d 77 (2d Cir. 1994) (applying *Weber* to post-arraignment strip searches of a person charged with a misdemeanor

pre-trial detainees and convicted criminals of all security levels. Moreover, plaintiffs were pretrial detainees who had been flagged, legitimately or not, as being "of high interest" to the post[-]September 11 investigation and were being held in a maximum security unit.

At the very least, it was not clearly established in the fall of 2001 that pretrial detainees held in highly restrictive detention in a federal facility could be searched only upon reasonable suspicion. *Cf. N.G. v. Connecticut*, 382 F.3d at 235 ("Perhaps the *Turner* standard applies to a state facility confining juveniles . . . awaiting trial for [conduct that would be a crime if committed by an adult.]"). There is no dispute, however, that during the period in which plaintiffs were confined in the ADMAX SHU, it was clearly established that a strip and body-cavity search policy had to be reasonably related to legitimate penological goals. *See Bell*, 441 U.S. 576 [*sic*]; *Covino*, 967 F.2d at 76-78.

b. *Reasonable Relation*

Under the *Covino/Turner* reasonable relation standard, plaintiffs state a constitutional violation. Plaintiffs assert that they were subjected to a policy of serial and daily suspicionless strip and body-cavity searches, and that such a policy was unmoored from any legitimate penological interest. Plaintiffs do not dispute that there are legitimate justifications for strip or body-cavity searches—*see Bell*, 441 U.S. at 558-560 (upholding body—cavity searches after contact visits); *Covino*, 967 F.2d at 77-80 (upholding random searches)—but they allege that such justifications were not present here. *Cf. Covino*, 967 F.2d at 80 (random visual searches are constitutional, but plaintiff's claim not dismissed because it was unclear whether purportedly random search proce-

dure was being used to harass or punish the inmate); *Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (second search of administrative detainee appears to be unreasonable when detainee had been under continuous escort after initial search) (citing *Bono v. Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980) (*Bell* rationale does not justify strip searches after noncontact, supervised visits absent a showing that there is some risk that contraband will be smuggled into the prison)). In sum, the success or failure of these claims as well will turn on the particular facts of the case.

c. *Personal Involvement*

Hawk Sawyer, Hasty, and Zenk all seek dismissal based on an asserted failure to allege their personal involvement in the allegedly unreasonable searches. Hasty argues that plaintiffs do not allege that he participated in or witnessed any challenged search. Zenk contends that the specific searches alleged by plaintiffs occurred prior to April 22, 2002, the day Zenk became warden, and Hawk Sawyer argues that plaintiffs have failed to allege that she participated in, or was even informed of, the alleged unconstitutional searches.

Plaintiffs have sufficiently alleged the personal involvement of the Wardens. *See McKenna*, 386 F.3d at 433-34. Zenk's claim that plaintiff's [*sic*] allegations pre-date his involvement is defeated by my obligation to draw all factual inferences from the facts alleged in plaintiffs' favor. Such a claim, if accurate, can be resolved at the Rule 56 stage after discovery has been completed.

I find, however, that plaintiffs' have failed to adequately allege the involvement of Hawk Sawyer in the challenged searches. To be sure, Hawk Sawyer's (and

the BOP Defendants')[24] involvement is alleged in conclusory fashion at two locations in the complaint. *See* ¶¶ 134, 142. But those boilerplate allegations conflict with the specific allegation in ¶ 58 that "[t]he procedures for handling detainees on the ADMAX SHU was developed by [certain MDC personnel] at the request of Defendant Hasty." Moreover, as compared to the alleged policy to deprive detainees of their due process rights, the strip search allegations against Hawk Sawyer draw less support from the context in which defendants' conduct occurred.[25] Accordingly, Hawk Sawyer's motion to dismiss the claim is granted.

6. *Interference with Religious Practices (Claim 10)*

Plaintiffs allege that, as a matter of policy, MDC officers interfered with their religious practices in violation of the Free Exercise Clause of the First Amendment. Specifically, plaintiffs allege that MDC officers banged on their cells while they were praying, routinely confiscated their copies of the Koran, and refused to permit plaintiffs to participate in Friday prayer services with other Muslims. Plaintiffs allege that the Wardens,

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[24] It is not clear from the complaint whether plaintiffs intended to assert this claim against Cooksey and Rardin, the other higher-level BOP Defendants. Plaintiffs have not alleged grounds to support a claim that Cooksey and Rardin were personally involved in the unreasonable search policy. To the extent that plaintiffs intended to assert such claims, those claims are dismissed.

[25] *See* Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* 33-35 (December 2003) (discussing strip searches conducted by MDC staff, and stating that it did not appear that the MDC issued written policies for when detainees were to be strip searched, and to the extent there may have been a policy, it was applied inconsistently).

among others, were instrumental in the implementation of such a policy, or that they knew (or should have known) that their subordinates were unlawfully interfering with plaintiffs' religious practices but did nothing to curtail such actions. The Wardens assert, among other things, that plaintiffs should have complained through administrative channels, and that plaintiffs have failed to sufficiently allege their personal involvement. In addition, Hasty asserts that he reasonably deferred to the MDC chaplain on issues concerning the religious accommodation of inmates at the ADMAX SHU.

While inmates "clearly retain protections afforded by the First Amendment," there are limitations based on institutional security, among other things. *O'Lone v. Shabazz*, 482 U.S. 342, 348-49 (1987). A challenge to a prison policy on those grounds requires the court to determine whether the policy is reasonably related to legitimate penological interests. *Id.* at 349. In *O'Lone*, the Court held that regulations that may prevent Muslims from attending Jumu'ah (a weekly service held every Friday afternoon) were reasonably related to a legitimate concern for institutional safety.[26] *Id.* at 345, 350-51, 53.

Here, plaintiffs have stated a claim under the First Amendment. Whether the policy or policies that allegedly impinged on their rights existed, and if so whether they were reasonably related to legitimate objectives are not questions that can be resolved on a motion to

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[26] The challenged regulations in *O'Lone* concerned the prison's policies of assigning inmates to jobs outside the main building and preventing those inmates from returning to the main building during the day (where the Jumu'ah service was held). 482 U.S. at 355-47 [*sic*].

dismiss. *Cf. O'Lone,* 482 U.S. at 350-353 (the Supreme Court's determination that regulations were reasonably related to legitimate objectives was grounded in testimony by, among others, prison officials at a two-day hearing before the district court). Similarly, whether Hasty deferred to the MDC chaplain, and whether such deference was reasonable, are questions for summary judgment or trial.

Plaintiffs have also sufficiently alleged the Wardens' personal involvement. They need not allege that the Wardens themselves banged on cells or confiscated Korans to state a claim of supervisory liability. *Cf. Noguera v. Hasty,* 2001 WL 243535, at *3 (S.D.N.Y. March 12, 2001) (where "the parties dispute almost every fact relevant to the qualified immunity determination, particularly the extent of the information provided to [the supervisory defendants] . . . and the response of those officers to the information provided," summary judgment is not warranted). Plaintiffs have alleged that the Wardens had knowledge of the violations and allowed them to continue; their disavowal of such knowledge does not warrant dismissal of these claims.

7. *Racial and Religious Discrimination (Claims 11 and 12)*

Plaintiffs allege that harsher conditions of confinement were imposed upon them because of their religious beliefs and race, in violation of the First Amendment and the Equal Protection Clause of the Fifth Amendment, respectively. They claim that defendants created or implemented such a discriminatory policy, or failed to remedy the policy once it was imposed. Defendants assert that plaintiffs fail to state a constitutional violation

and have not sufficiently alleged their personal involvement[.]

"No person can be punished for entertaining or professing religious beliefs or disbeliefs." *People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 210 (1948) (internal quotation omitted). While the protections afforded by the First Amendment may be limited in the prison setting for legitimate penological reasons, *see O'Lone v. Shabazz*, 482 U.S. at 348-49, a prisoner may not be punished because of his religious beliefs. *See, e.g., Cooper v. Pate*, 378 U.S. 546, 546 (1964) (prisoner's denial of privileges because of religious beliefs states a § 1983 claim) (citing *Pierce v. LaVallee*, 293 F.2d 233, 235 (2d Cir. 1961) (prisoner's allegation of punishment based upon religious beliefs states a First Amendment claim)); *Salahuddin v. Dalsheim*, 1996 WL 384898, at *12 (S.D.N.Y. July 9, 1996) (denying motion to dismiss where inmate alleged that his transfer to a new facility violated his free exercise rights). Nor can a prisoner be punished because of his race. *See, e.g., Turner*, 482 U.S. at 84 (prisoners protected against invidious racial discrimination by the Equal Protection Clause); *cf. Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) ("all racial classifications" imposed by government, including those in the prison context, must be analyzed under strict scrutiny).

Defendants contend that plaintiffs cannot state an equal protection claim because they have not alleged sufficient facts to show that (1) defendants acted with discriminatory animus or (2) plaintiffs were treated differently than members of another protected class. I disagree.

Proof of racially discriminatory intent is required to establish a violation of the Equal Protection Clause. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Such proof is not required, however, to survive a motion to dismiss. *See Phillip v. Univ. of Rochester*, 316 F.3d 291, 298 (2d Cir. 2003) (allegation that plaintiffs were singled out for maltreatment from a group that contained non-minorities is sufficient to survive a motion to dismiss). *Arlington Heights*, which defendants rely upon, is not to the contrary. There, the Court upheld a challenged zoning decision because the respondents, after trial, had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." 429 U.S. at 270. The Court elaborated on the fact-specific nature of the inquiry: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Such evidence may include the "historical background of the decision" and the "specific sequence of events leading up to the challenged decision." *Id.* at 267.

Here, plaintiffs allege that they were confined under significantly harsher conditions than other pretrial detainees because of their race and religion, and not because of any evidence that they were involved in terrorist activity. I cannot conclude as a matter of law that there is no set of facts consistent with plaintiffs' allegations that could entitle them to relief.

Defendants argue that plaintiffs fail to describe how defendants' treatment of other races was different than the treatment of plaintiffs. Plaintiffs are not required,

however, to plead such facts in order to proceed with their claim. *See Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001) ("a plaintiff who . . . alleges an express racial classification . . . is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection."). In any event, the allegation that plaintiffs were singled out for harsher treatment because of race and religion necessarily implies that other non-Muslim, non-Arab prisoners confined at MDC during the same period were not subjected to similarly harsh treatment. *See People United for Children, Inc. v. The City of New York*, 108 F. Supp. 2d 275, 297 n.15 (S.D.N.Y. 2000) (denying motion to dismiss equal protection claims; allegations imply that plaintiffs were treated differently).

a. *Personal Involvement*

Defendants argue that plaintiffs have failed to sufficiently allege their personal involvement. I agree with respect to the BOP Defendants but not with respect to Ashcroft, the FBI Defendants, or the Wardens. Plaintiffs assert that Ashcroft was the principal architect of the challenged policies (Compl. ¶ 10), and that Rolince and/or Maxwell classified them as "of high interest" because of their race, religion, or national origin. (Compl. ¶ 51.) In support of this assertion, plaintiffs allege that "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as "of interest" to the post-September 11th investigation. (Compl. ¶ 52.) Taking those allegations as true, it cannot be said that there are [*sic*] no

set of facts on which the plaintiffs would be entitled to relief as against Ashcroft and the FBI Defendants. Though Plaintiffs assert that the BOP defendants were instrumental in the imposition of the challenged policies, they do not allege that those defendants were involved in the challenged classification. Accordingly, these claims are dismissed against the BOP Defendants. Although plaintiffs also have not alleged that the Wardens were involved in their initial classification, they have alleged that the Wardens were personally involved in imposing harsher conditions of confinement because of plaintiffs' race and religion. Such a challenge, combined with the allegations of their treatment at the MDC, is sufficient to state a claim against the Wardens and defeat the assertion of qualified immunity on a motion to dismiss.

F. *Plaintiffs' Statutory Claims*

1. *Religious Freedom Restoration Act (Claims 13-15)*

Plaintiffs allege violations of their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). Specifically, they allege that because of their religious beliefs, they were subjected to (1) harsher conditions of confinement; (2) interference with their religious practice; and (3) physical and verbal abuse, and that these actions imposed a substantial burden on their religious exercise and belief. Defendants assert, among other things, that they are entitled to qualified immunity because it was not clearly established in October 2001 that RFRA applied to federal officials. I agree.

RFRA prohibits government[27] from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court "invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment." *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2118 (2005).

Plaintiffs argue that RFRA's application to federal officials was clearly established during the relevant period because (1) *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), implicitly holds that RFRA applies to federal officials; (2) other circuit courts that have considered the question post-*Boerne* have uniformly held that RFRA applies to federal officials; and (3) Congress amended RFRA post-*Boerne* (and prior to the alleged violations here) to eliminate references to state governments, and thus defendants could not have reasonably believed that RFRA did not apply to their actions. I find, however, that support for the proposition that it was clearly established in the Second Circuit that RFRA applied to federal officials during the 2001-2002 period

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[27] The term "government" includes "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." § 2000bb-2(1). RFRA accordingly reaches officials acting in their individual capacities[.] *See Solomon v. Chin*, 1997 WL 160643, at *5 (S.D.N.Y. April 7, 1997) (allowing claim under RFRA to proceed against prison officers in their individual capacities).

is too tenuous to provide a basis for denying qualified immunity. *Cf. Back*, 365 F.3d at 129-130 (clearly established analysis based on whether the decisional law of the Supreme Court and the applicable circuit court supports the existence of the right in question).

Neither the Supreme Court nor the Second Circuit has directly addressed the applicability of RFRA to federal officials post-*Boerne*. *See Cutter*, 125 S. Ct. at 2118 n.2 ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. This Court, however, has not had occasion to rule on the matter.") (citations omitted); *Browne*, 176 F.3d at 26. In *Browne*, the Second Circuit affirmed the dismissal of a claim asserting that an IRS judgment violated RFRA. *Id.* The district court had questioned RFRA's continuing constitutionality post-*Boerne*, but assumed it was constitutional for the purposes of its decision. *See Browne v. United States*, 22 F.Supp.2d 309, 312 (D. Vt. 1998). On appeal, the Second Circuit did not discuss RFRA's constitutionality.[28] In comparison to the thorough discussion of the question by appellate courts that have directly addressed the issue (discussed below), the *Browne* court's silence does not

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[28] Following *Browne*, at least one district court in this circuit has noted that RFRA continues to apply to the federal government, *see Marrero v. Apfel*, 87 F. Supp. 2d 340, 348 (S.D.N.Y. 2000) (construing claim that *pro se* applicant was entitled to Social Security benefits on the ground that his religious faith prevents him from working a regular job as a claim under RFRA), while another district court assumed that RFRA continued to apply to the federal government where neither party challenged its continuing applicability. *United States v. Any and All Radio Station Equipment*, 93 F. Supp. 2d 414, 418 n.4 (S.D.N.Y. 2000).

provide strong support for the proposition that RFRA's applicability to the federal government was clearly established. Moreover, in *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003), the Second Circuit stated that the Supreme Court had "invalidated" RFRA:

> While it was still good law, we dutifully applied RFRA's substantial burden test to prisoners' free exercise claims, despite the Supreme Court's suggestion in [*Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990)] that so doing puts courts in "the unacceptable business of evaluating the relative merits of differing religious claims." Now with RFRA invalidated, however, the Circuits apparently are split over whether prisoners must show a substantial burden on their religious exercise in order to maintain free exercise claims.

352 F.3d at 592 (quoting *Smith*, 494 U.S. at 887, other citations omitted). While the holding in *Ford* concerned RFRA's applicability to the states, the Second Circuit did not temper its language to make this distinction clear.

Plaintiffs argue that all other circuit courts that have squarely addressed the issue have held that RFRA continues to apply to the federal government[29] and that even where there is no Second Circuit or Supreme Court authority directly on point, decisions of other circuits

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[29] *See Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Guam v. Guerrero*, 290 F.3d 1210, 1220-22 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950, 958-60 (10th Cir. 2001); *In re Young*, 141 F.3d 854, 858-863 (8th Cir. 1998).

may warrant the conclusion that a right was clearly established. In fact, the Second Circuit's decisions have sent "conflicting signals" on the latter issue, *see African Trade & Information Center, Inc. v. Abromaitis*, 294 F.3d 355, 361 (2d Cir. 2002), but I need not resolve it here, as the cases plaintiffs rely on suggest that during the 2001-2002 period in question here, RFRA's applicability to the federal government was unclear. For example, in 2003, prior to its holding in *O'Bryan*, the Seventh Circuit stated only that *Boerne* had "left open the possibility" that RFRA still applied to the federal government. *See United States v. Israel*, 317 F.3d 768, 770-71 (7th Cir. 2003) (assuming RFRA's constitutionality as applied to the federal government where neither party contested it). Similarly, the Ninth Circuit explained in *Guam v. Guerrero* that it previously had "not definitively held RFRA constitutional as applied in the federal realm." 290 F.3d at 1220. And *Kikumura* reversed a district court's holding that *Boerne* had rendered RFRA claims against federal prison officials unconstitutional as well. 242 F.3d at 958-60. Thus, the legal landscape in which the actions challenged in this case occurred differs markedly from that of *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997) (finding reasonable suspicion standard for strip searching prison visitors was clearly established where three other circuits had so held prior to the search at issue and second circuit decisions had "foreshadowed" that standard); and *Weber*, 804 F.2d at 803-04 (relying on eleven decisions from other circuit courts, three of which antedated questioned search, in finding law clearly established).

I find that it was not clearly established in October 2001 that RFRA applied to the federal government. Ac-

cordingly, defendants are entitled to qualified immunity and the motions to dismiss these claims are granted.

2. *Conspiracy Under 42 U.S.C. § 1985(3) (Claims 16 and 17)*

Plaintiffs claim that the defendants conspired to deprive them of equal protection of the laws and of equal privileges and immunities of the laws because of plaintiffs' religious beliefs, race, and national origin, in violation of 42 U.S.C. § 1985(3). Specifically, plaintiffs claim that (1) Ashcroft, Mueller, the BOP Defendants, and the Wardens, among others, agreed to subject plaintiffs to unnecessarily harsh conditions of confinement without due process; (2) the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; and (3) the Wardens and other MDC defendants agreed to substantially burden Elmaghraby's religious practice while he was housed in the ADMAX SHU. Defendants assert that (1) they are entitled to qualified immunity because it is not clearly established law in the Second Circuit that 42 U.S.C. § 1985(3) applies to suits against federal officers; and (2) plaintiffs fail to sufficiently allege facts establishing their personal involvement in the alleged deprivations.

42 U.S.C. § 1985(3) reads, in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be

> done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

To make out a violation of 42 U.S.C. § 1985(3), a plaintiff "must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 828-29 (1983). With respect to the second element, a plaintiff must show that the conspiracy was motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id.* (internal quotation omitted); *see also Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 419 (2d Cir. 1999); *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993).

a. *Clearly Established Law*

Defendants argue that the Second Circuit has never recognized that [§] 1985(3) is available for suits against federal officials sued in their individual capacities. In *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), the Second Circuit held that the United States Attorney General had absolute immunity from civil actions for malicious prosecution. 177 F.2d at 581. In reaching its deci-

sion, the court implied that § 1985(3) required state action. *Id.* In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that § 1985(3) did not contain a state action limitation. 403 U.S. at 101. The Court stated that instead, a plaintiff was required to establish "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.

Like other district courts in this circuit, I conclude that the "holding in *Griffin* necessarily extends section 1985(3) to reach racially motivated conspiracies involving federal officers." *Li v. Canarozzi*, 1997 WL 40979, at *4 (S.D.N.Y. Feb. 3, 1997). As Judge Sand reasoned:

> Although the Second Circuit has yet to adopt this broader reading of 1985(3), its most recent authority to the contrary, *Gregoire v. Biddle*, preceded not only the Supreme Court's decision in *Griffin* but also the evolution of the doctrine of qualified immunity. . . . The *Gregoire* Court's holding followed a discussion of the danger of allowing federal officials to be sued for conduct in the course of their official duties. Many of those concerns are now addressed by the various immunities available to federal officials, including those arising pursuant to the FTCA and qualified immunity.

1997 WL 40979, at *3 (citations omitted); *see also Moriani v. Hunter*, 462 F. Supp. 353, 356 (S.D.N.Y. 1978) ("Unless there is a rationale, unknown to the past cases, for holding that federal officers are not 'persons' under § 1985(3), there is no longer any reason to exclude from coverage federal officers acting under color of federal law."); *Hobson v. Wilson*, 737 F.2d 1, 44 (D.C. Cir. 1984) (*Gregoire* effectively overruled by *Griffin*; apply-

ing § 1985(3) to FBI agents); *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982) (§ 1985(3) action available against federal officials). I conclude that, after *Griffin*, it was clearly established that § 1985(3) applied to federal officers.

b. *Personal Involvement*

To survive a motion to dismiss on a conspiracy claim, a plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Gourd*, 340 F.3d 105, 110 (2d Cir. 2003) (internal quotation omitted). Plaintiffs are also required to allege "with at least some degree of particularity, overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." *Thomas v. Roach*, 165 F.3d 137, 147 (2d Cir. 1999).

Plaintiffs assert that they have met these standards by alleging that various defendants agreed to deprive plaintiffs of their rights, and by alleging that defendants adopted and implemented policies which deprived plaintiffs of these rights. As discussed in connection with plaintiffs' Fourth Amendment claim, plaintiffs have not sufficiently alleged the personal involvement of the BOP Defendants in subjecting them to "unnecessary and extreme strip and body-cavity searches," and the BOP Defendants' motions are granted as to that alleged agreement. In all other respects, defendants motions to dismiss the § 1985 claims are denied. As discussed above, I am mindful of the fact that cabinet-level and other high-ranking government officials may not properly be burdened by litigation based on conclusory allegations that they are responsible (through policy-making or fail-

ing to supervise) the alleged torts of federal employees. Nevertheless, I am not convinced, given the particularized allegations in paragraphs 249-51 and the virtually unique context in which the alleged actions occurred, that there is no set of facts consistent with those allegations on which plaintiffs will be entitled to relief against the defendants.

3. *Alien Tort Statute (Claim 21)*

Plaintiffs allege that the moving defendants engaged in acts which "had the intent and the effect of grossly humiliating Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and moral resistance." Compl. ¶ 267. Plaintiffs assert that these acts constituted cruel, inhuman, or degrading treatment in violation of international law, and bring a claim under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS").

The United States moves to be substituted for the individual defendants pursuant to the Liability Reform Act, 28 U.S.C. § 2679, and for dismissal of the ATS claim on the ground of sovereign immunity. In addition, defendants assert that they are entitled to qualified immunity because, among other things, it was not clearly established during the relevant period what acts fall within the ambit of the ATS.

Plaintiffs concede that if the motion for substitution is granted, then the ATS claims should be dismissed because the United States has not waived its sovereign immunity from claims for money damages brought pursuant to the ATS. *See* Pl.'s Opp'n. Mem. at 5.

a. *Liability Reform Act*

The Liability Reform Act provides that for civil actions based on the wrongful conduct of federal employees acting within the scope of their employment, the only available remedy is a claim under the Federal Tort Claims Act against the government itself. 28 U.S.C. § 2679(b). There are two exceptions to this exclusive remedy provision. It does not apply to actions against an employee of the government "brought for a violation of the Constitution of the United States, or . . . for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A), (B).

Although the question is not free from doubt, I find that because it is "international law *cum* common law" *see Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 (2004), that defines the claims for which the ATS provides jurisdiction, the statute does not fall into the § 2679(b)(2)(B) exception to the Liability Reform Act.

The ATS reads in its entirety as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute, although "in terms only jurisdictional," enables "federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa*, 124 S. Ct. at 2754. In *Sosa*, the Court concluded that although the ATS did not create new causes of action, "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with

a potential for personal liability at the time." *Id.* at 2761.

Plaintiffs argue that because the ATS authorizes a limited category of actions, it falls within the § 2672(b)(2)(B) exception for violations of a statute. The ATS does not, however, impose any duties or obligations on an individual. *See United States v. Smith*, 499 U.S. 160, 174 (1991) (holding that the § 2679(b)(2)(B) exception did not apply to the Gonzalez Act, 10 U.S.C. § 1089, which immunized federal employees from individual medical malpractice suits). In *Smith*, the Court concluded that the § 2679(b)(2)(B) exception did not apply because the Gonzalez Act itself could not be violated: Nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians," and therefore "a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." 499 U.S. at 174. Similarly, the ATS itself cannot be "violated." *See Bancoult v. McNamara*, 370 F. Supp. 2d 1, 10 (D.D.C. 2004) ("The plain language of AT[S], however, does not confer rights nor does it impose obligations or duties that, if violated, would trigger the § 2672(b)(2)(B) exception. . . . A claim brought pursuant to the AT[S], therefore, is based on violation of rights conferred under international law, not the AT[S]."); *Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (en banc), *reversed on other grounds sub nom., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 266-67 (D.D.C. 2004); *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 353 (D.N.J. 2003).

Because the ATS is not a statute that itself can be violated, it does not fall within the § 2679(b)(2)(B) excep-

tion. Accordingly, the government's motion for substitution is granted. Because the United States has not waived its sovereign immunity from suits seeking money damages under international law, its motion to dismiss the ATS claim is granted. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 474 (1994) (absent an express waiver of sovereign immunity, a plaintiff may not sue the United States in federal court).[30]

CONCLUSION

For the foregoing reasons, the motions to dismiss are granted in part and denied in part:

Claim 1:	The Wardens' motions to dismiss are denied.
Claim 2:	Defendants' motions to dismiss are denied.
Claims 3-4:	Hasty's motion to dismiss is denied.
Claim 5:	Hasty's motion to dismiss is denied.
Claims 6-7:	Lorenzo's motion to dismiss is denied.
Claim 8:	The Wardens' motions to dismiss are denied.

[30] Because I find that the ATS does not fall within an exception to the Liability Reform Act and grant the United States' motions for substitution and dismissal of the ATS claims, I need not decide whether it was clearly established that the alleged violations of international law fell within the ambit of the ATS during the relevant period.

Claim 9:	The Wardens' motions to dismiss are denied. Hawk Sawyer's motion to dismiss is granted.
Claim 10:	The Wardens' motions to dismiss are denied.
Claims 11-12:	The Wardens' motions to dismiss are denied. Ashcroft and the FBI Defendants' motions to dismiss are denied. The BOP Defendants' motions to dismiss are granted.
Claims 13-15:	Defendants' motions to dismiss are granted.
Claims 16-17:	The BOP Defendants' motions to dismiss are granted with respect to the alleged agreement to subject plaintiffs to unnecessary and extreme strip and body-cavity searches. In all other respects, Defendants' motions to dismiss are denied.
Claim 21:	The United States' motions for substitution and dismissal are granted. The claim is dismissed as to all defendants.

So Ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Docket Number: 05-5768-cv
Short Title: Elmaghraby v. Ashcroft
DC Docket Number: 04-cv-1809
DC: EDNY (BROOKLYN)
DC Judge: Honorable John Gleeson

JAVID [*sic*] IQBAL, PLAINTIFF-APPELLEE

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL COOKSEY, FORMER ASSISTANT DIRECTOR FOR CORRECTIONAL PROGRAMS OF THE BUREAU OF PRISONS, JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, DAVID RARDIN, FORMER DIRECTOR OF THE NORTHEAST REGION OF THE BUREAU OF PRISONS, MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION, KATHLEEN HAWK SAWYER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS, KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION, DEFENDANTS-APPELLANTS

[Filed: Sept. 18, 2007]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18 day of September two thousand seven.

A petition for panel rehearing and petition for rehearing en banc having been filed herein by the appellees Ehab Elmaghraby and Javaid Iqbal, appellants John Ashcroft and Robert Mueller, and appellants Kenneth Maxwell and Michael Rolince. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: /s/ ILLEGIBLE
Motion Staff Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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04 CV 1809 (JG)(JA)

EHAB ELMAGHRABY AND JAVAID IQBAL, PLAINTIFFS

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION; KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION; KATHLEEN HAWK SAWYER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS; DAVID RARDIN, FORMER DIRECTOR OF THE NORTHEAST REGION OF THE BUREAU OF PRISONS; MICHAEL COOKSEY, FORMER ASSISTANT DIRECTOR FOR CORRECTIONAL PROGRAMS OF THE BUREAU OF PRISONS; DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; MICHAEL ZENK, WARDEN OF THE METROPOLITAN DETENTION CENTER; LINDA THOMAS, FORMER ASSOCIATE WARDEN OF PROGRAMS OF THE METROPOLITAN DETENTION CENTER; ASSOCIATE WARDEN SHERMAN, ASSOCIATE WARDEN OF CUSTODY FOR THE METROPOLITAN DETENTION CENTER; CAPTAIN SALVATORE LOPRESTI; LIEUTENANT STEVEN BARRERE; LIEUTENANT

WILLIAM BECK; LIEUTENANT LINDSEY BLEDSOE; LIEUTENANT JOSEPH CUCITI; LIEUTENANT THOMAS CUSH; LIEUTENANT HOWARD GUSSAK; LIEUTENANT MARCIAL MUNDO; LIEUTENANT DANIEL ORTIZ; LIEUTENANT ELIZABETH TORRES; CORRECTIONS OFFICER REYNALDO ALAMO; CORRECTIONS OFFICER SYDNEY CHASE; CORRECTIONS OFFICER JAMES CLARDY; CORRECTIONS OFFICER RAYMOND COTTON; CORRECTIONS OFFICER MICHAEL DEFRANCISCO; CORRECTIONS OFFICER RICHARD DIAZ; CORRECTIONS OFFICER JAI JAIKISSON; CORRECTIONS OFFICER DEXTER MOORE; CORRECTIONS OFFICER JON OSTEEN; CORRECTIONS OFFICER ANGEL PEREZ; CORRECTIONS OFFICER SCOTT ROSEBERRY; UNIT MANAGER CLEMMETT SHACKS; NORA LORENZO, PHYSICIAN'S ASSISTANT; "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "JOHN DOE" BEING FICTIONAL FIRST AND LAST NAMES; AND THE UNITED STATES OF AMERICA, DEFENDANTS

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiffs EHAB ELMAGHRABY and JAVAID IQBAL, by their attorneys, the Urban Justice Center and Koob & Magoolaghan, allege upon knowledge as to themselves and upon information and belief as to all other matters as follows:

NATURE OF ACTION

1. This is an action brought by Plaintiffs EHAB ELMAGHRABY and JAVAID IQBAL to remedy the brutal mistreatment and discrimination each Plaintiff

suffered while in the care, custody, and control of Defendants. Plaintiffs ELMAGHRABY and IQBAL are Muslim men from Egypt and Pakistan, respectively. In the months after September 11, 2001, Plaintiffs were detained at the Metropolitan Detention Center ("MDC") in Brooklyn, New York. Plaintiffs were arbitrarily classified as being "of high interest" to the government's terrorism investigation after September 11th, and accordingly were housed in the MDC's Administrative Maximum ("ADMAX") Special Housing Unit ("SHU").

2. While in the ADMAX SHU, Plaintiffs were subjected to a pattern and practice of cruel, inhuman, and degrading treatment in violation of the First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution, federal statutory law, and customary international law. Among other things, they were deliberately and cruelly subjected to numerous instances of excessive force and verbal abuse, unlawful strip and body cavity-searches, the denial of medical treatment, the denial of adequate nutrition, extended detention in solitary confinement, the denial of adequate exercise, and deliberate interference with their rights to counsel and to exercise of their sincere religious beliefs. They were placed in tiny cells for more than 23 hours per day, and strip-searched, manacled and shackled when removed from their cells. Plaintiffs were housed in the ADMAX SHU in the absence of adequate standards or procedures for determining that such a classification was appropriate, or that the classification should continue, in violation of the Fifth Amendment to the United States Constitution.

3. Plaintiffs were singled out for such mistreatment because of their race, national origin, and religion.

Defendants, by creating, participating in, and endorsing Plaintiffs' systematic mistreatment, violated the principles enunciated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, the Religious Freedom Restoration Act ("RFRA"), 42 USC § 2000bb, the civil rights conspiracy statute, 42 U.S.C. § 1985(3), and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq.

4. As a result of Defendants' misconduct, Plaintiffs suffered severe and permanent physical injuries, and severe emotional distress and humiliation. Plaintiffs now bring this lawsuit to redress these wrongs and to seek just and fair compensation.

JURISDICTION AND VENUE

5. This action is brought pursuant to *Bivens*, under the First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution, 28 U.S.C. § 1346(b), 28 U.S.C. §1350, and 42 U.S.C. §§ 1985(3) and 2000bb.

6. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346(b), and 1350.

7. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b), as the events giving rise to this action occurred within this district.

PARTIES

8. Plaintiff EHAB ELMAGHRABY is a native and citizen of Egypt, where he currently resides. He was detained in the MDC from on or about October 1, 2001 to on or about August 28, 2002.

9. Plaintiff JAVAID IQBAL is a native and citizen of Pakistan, where he currently resides. He was detained in the MDC from on or about November 5, 2001 to on or about January 15, 2003.

10. Defendant JOHN ASHCROFT is the Attorney General of the United States. As Attorney General, Defendant ASHCROFT has ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws. He is a principal architect of the policies and practices challenged here. He authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

11. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation ("FBI"). As FBI Director, he was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here.

12. Defendant MICHAEL ROLINCE was at all relevant times the Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and as such was instrumental in the implementation of the policies and practices challenged here.

13. Defendant KENNETH MAXWELL was at all relevant times the Assistant Special Agent in Charge, New York Field Office, FBI and as such was instrumental in the implantation [*sic*] of the polices [*sic*] and practices challenged here.

14. Defendant KATHLEEN HAWK SAWYER was at all relevant times the Director of the Federal Bureau of Prisons. As such, Defendant SAWYER was responsible for the custody, care and control of the

individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. She authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

15. Defendant DAVID RARDIN was at all relevant times the Director of the Northeast Region of the Bureau of Prisons. As such, Defendant RARDIN was responsible for the custody, care and control of the individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. He authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

16. Defendant MICHAEL COOKSEY was at all relevant times the Assistant Director for Correctional Programs of the Bureau of Prisons. As such, Defendant COOKSEY was responsible for ensuring a safe and secure institutional environment for the individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. He authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

17. Defendant DENNIS HASTY was at some relevant times the Warden of the MDC. While Warden, Defendant HASTY was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. While Ward-

en, Defendant HASTY subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

18. Defendant MICHAEL ZENK is currently the Warden of the MDC. As Warden, Defendant ZENK was responsible at some relevant times for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. As Warden, Defendant ZENK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

19. Defendant LINDA THOMAS is the former Associate Warden of Programs of the MDC and was at all relevant times the Associate Warden of Programs of the MDC. While Associate Warden, Defendant THOMAS was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. As Associate Warden, Defendant THOMAS subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

20. Defendant SHERMAN is the Associate Warden of Custody of the MDC and was at all relevant times the Associate Warden of Custody of the MDC. While Associate Warden, Defendant SHERMAN was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. As Associate Warden, Defendant SHERMAN subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

21. Defendant Captain SALVATORE LOPRESTI is and was at all relevant times employed at the MDC. While Captain, Defendant LOPRESTI was responsible

for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising and training officers who brutalized and mistreated Plaintiffs. As Captain, Defendant LOPRESTI subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

22. Defendant Lieutenant STEVEN BARRERE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BARRERE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

23. Defendant Lieutenant WILLIAM BECK is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BECK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

24. Defendant Lieutenant LINDSEY BLEDSOE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BLEDSOE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

25. Defendant Lieutenant JOSEPH CUCITI was at all relevant times a federal corrections officer employed at the MDC. Defendant CUCITI subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

26. Defendant Lieutenant THOMAS CUSH is and was at all relevant times a federal corrections officer employed at the MDC. Defendant CUSH subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

27. Defendant Lieutenant HOWARD GUSSAK was at all relevant times a federal corrections officer employed at the MDC. Defendant GUSSAK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

28. Defendant Lieutenant MARCIAL MUNDO is and was at all relevant times a federal corrections officer employed at the MDC. Defendant MUNDO subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

29. Defendant Lieutenant DANIEL ORTIZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant ORTIZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

30. Defendant Lieutenant ELIZABETH TORRES is and was at all relevant times a federal corrections officer employed at the MDC. Defendant TORRES subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

31. Defendant REYNALDO ALAMO is and was at all relevant times a corrections officer employed at the MDC. Defendant ALAMO subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

32. Defendant SYDNEY CHASE is and was at all relevant times a corrections officer employed at the MDC. Defendant CHASE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

33. Defendant JAMES CLARDY is and was at all relevant times a corrections officer employed at the MDC. Defendant CLARDY subjected Plaintiffs to un-

reasonable and excessively harsh conditions of confinement.

34. Defendant RAYMOND COTTON is and was at all relevant times a corrections officer employed at the MDC. Defendant COTTON subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

35. Defendant MICHAEL DEFRANCISCO was at all relevant times a federal corrections officer employed at the MDC. Defendant DEFRANCISCO subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

36. Defendant RICHARD DIAZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant DIAZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

37. DEFENDANT [*sic*] JAI JAIKISSON is and was at all relevant times a federal corrections officer employed at the MDC. Defendant JAIKISSON subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

38. Defendant DEXTER MOORE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant MOORE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

39. Defendant JON OSTEEN was at all relevant times a federal corrections officer employed at the MDC. Defendant OSTEEN subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

40. Defendant ANGEL PEREZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant PEREZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

41. Defendant SCOTT ROSEBERRY is and was at all relevant times a federal corrections officer employed at the MDC. Defendant ROSEBERRY subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

42. Defendant CLEMMETT SHACKS is and was at all relevant times a federal corrections officer employed at the MDC. Defendant SHACKS was the Unit Manager for the ADMAX SHU. Defendant SHACKS subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

43. Defendant NORA LORENZO is and was at all relevant times a physician's assistant employed at the MDC and was at all relevant times responsible for the delivery of medical care to Plaintiffs.

44. Defendants "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "John Doe" being fictional first and last names, are and were at all relevant times federal corrections officers employed at the MDC. Defendants DOE Nos. 1-19 subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

45. Defendant UNITED STATES OF AMERICA, by virtue of the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., is liable for the tortuous conduct of the individual Defendants named herein, including assault, battery, negligence, and intentional infliction of emotional distress.

46. All Defendants named herein acted under color of federal law and within the scope of their office or employment.

STATEMENT OF FACTS

General Background

47. In the months after September 11, 2001, the Federal Bureau of Investigation ("FBI"), under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men, designated herein as "post-September 11th detainees," as part of its investigation of the events of September 11.

48. Many of these men, including Plaintiffs, were classified as being "of high interest" to the government's post-September-11th investigation by the FBI without specific criteria or a uniform classification system.

49. In many cases, including Plaintiffs', the classification was made because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity.

50. Defendants ROLINCE and/or MAXWELL were responsible for making the initial determination as to whether detainees arrested within the New York area in the weeks and months after September 11 were classified as "of high interest" to the government's investigation.

51. Defendants ROLINCE and/or MAXWELL classified Mr. Elmaghraby and Mr. Iqbal as "of high interest" to the post-September-11th investigation because of their race, religion, and national origin, and not

because of any evidence that Plaintiffs were involved in terrorist activity.

52. Indeed, within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as "of interest" to the post-September-11th investigation.

53. Those post-September 11th detainees classified by the FBI as being "of high interest" were confined at the MDC in Brooklyn, New York, in the ADMAX SHU, which is the Federal Bureau of Prisons' ("BOP") most restrictive type of confinement.

54. The ADMAX SHU was quickly created on MDC's ninth floor to house post-September 11th detainees.

55. Prior to September 11, 2001, the MDC had a SHU, but not an ADMAX SHU.

56. The MDC had as many as 60 detainees housed in the ADMAX SHU at one time.

57. The officers who worked on the ADMAX SHU were selected by Defendants HASTY, SHERMAN, and LOPRESTI.

58. The procedures for handling detainees on the ADMAX SHU were developed by Defendants SHERMAN, LOPRESTI, and CUCITI, at the request of Defendant HASTY.

59. The ADMAX SHU enforced a four-man hold restraint policy, the use of hand-held cameras to record

detainee movements, cameras in each cell to monitor detainees, and physical security enhancements.

60. Post-September 11th detainees in the ADMAX SHU were subjected to highly restrictive conditions of confinement. They were not permitted to move about the unit, use the telephone freely, nor were they permitted any electronic equipment in their cells, such as small radios. Post-September 11th detainees moved outside their cells only when they were restrained with handcuffs and leg irons and escorted by four staff members.

61. For many weeks, post-September 11th detainees in the ADMAX SHU were subjected to a communications blackout that barred them from receiving telephone calls, visitors, mail, and from placing telephone calls. During this period, the post-September 11th detainees, including Plaintiff ELMAGHRABY, were unable to make any contact with their attorneys or families.

62. Compounding this situation, MDC employees often turned away lawyers and family members who came to visit individual post-September 11th detainees by falsely stating that the individual detainee was no longer detained in the MDC.

63. Markedly different from the conditions in the MDC 's [*sic*] general population, detainees in the ADMAX SHU were permitted to leave their cells for only one hour a day, at most, and their legal and social visits were non-contact, with a clear partition between the parties.

64. Because of the highly restrictive nature of the ADMAX SHU, BOP regulations require an employee

known as the Segregation Review Official to conduct a weekly review of the status of each inmate housed in the SHU after he has spent seven days in administrative detention or disciplinary segregation. The Segregation Review Official is also required to conduct a formal hearing every 30 days assessing the inmate's status. The Segregation Review Official's finding must be approved by the Reviewing Authority.

65. Although Defendants BLEDSOE, BECK, and ORTIZ were assigned to be Segregation Review Officials while Plaintiffs were held within the ADMAX SHU, Defendants BLEDSOE, BECK, and ORTIZ never conducted the individual reviews required by regulation to ensure that placement of Plaintiffs in ADMAX SHU was necessary to vindicate the safety and security interests of the MDC.

66. During the time that Defendants BLEDSOE, BECK, and ORTIZ worked as Segregation Review Officials, Defendant LOPRESTI was the Reviewing Authority. Defendant LOPRESTI approved BLEDSOE, BECK, and ORTIZ'S recommendation to continue holding Plaintiffs in the ADMAX SHU although LOPRESTI was aware that the required review procedures had not been followed.

67. The appropriate review processes were never provided to the post-September 11th detainees, including Plaintiffs. Instead, the detainees were held in the ADMAX SHU until the FBI approved their release to the general population unit.

68. Until the FBI approved the release of a particular detainee, MDC policy was to automatically annotate the detainee status with the phrase "continue high security." The post-September 11th detainees were not

afforded any hearings, and they remained under restrictive detention in the ADMAX SHU as a matter of policy until defendant COOKSEY issued a memorandum approving their release to general population.

69. The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.

70. Consistent with this policy, on or about October 1, 2001, defendant COOKSEY directed that all detainees "of high interest" be confined in the most restrictive conditions possible until cleared by the FBI.

71. Defendant SAWYER was aware of and approved of the policies enunciated by Defendant COOKSEY with regard to the confinement of detainees "of high interest" in BOP facilities.

72. Defendants ROLINCE and MAXWELL, after mid-September 2001, were jointly responsible for determining whether a detainee had been "cleared" of any connection to terrorist activity.

73. Officials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC.

74. Nonetheless, Defendants ASHCROFT, MUELLER, and ROLINCE never imposed deadlines for the "clearance" process, and many detainees were held in the ADMAX SHU even after they were approved for release to the general population unit by the FBI.

75. As a result numerous detainees, including Plaintiffs, were held in ADMAX SHU for extended periods of time, although there was no evidence linking them to terrorist activity.

76. Moreover, defendants ROLINCE and MAXWELL failed to approve post-September 11 detainees' release to general population based simply on the detainees' race, religion, and national origin, and not based on any evidence that continued detention in ADMAX SHU was important or relevant to the FBI's investigation of the events of September 11, 2001.

Cruel and Inhumane Conditions of Confinement in the ADMAX SHU

77. MR. ELMAGHRABY was arrested on or about September 30, 2001 by local and federal law enforcement agents.

78. On or about October 1, 2001, MR. ELMAGHRABY was brought to the MDC and housed in the ADMAX SHU.

79. Mr. ELMAGHRABY was housed in the ADMAX SHU the entire time he was detained at the MDC from on or about October 1, 2001 to on or about August 28, 2002.

80. Mr. IQBAL was arrested on or about November 2, 2001 by INS and FBI agents.

81. On or about November 5, 2001 Mr. IQBAL was taken to the MDC and housed in the general population unit on the fifth floor. Mr. IQBAL was housed in the ADMAX SHU from on or about January 8, 2002 until approximately the end of July 2002, at which time he was released back to the general population unit.

82. While detained in the ADMAX SHU, Plaintiffs were kept in solitary confinement, not permitted to leave their cells for more than one hour each day with few exceptions, verbally and physically abused, routinely subjected to humiliating and unnecessary strip and body-cavity searches, denied access to basic medical care, denied access to legal counsel, denied adequate exercise and nutrition, and subjected to cruel and inhumane conditions of confinement.

83. The conditions of Plaintiffs' confinement incited fear and anguish, exacerbated their physical pain and emotional distress, and subjected them to embarrassment and humiliation.

84. Plaintiffs were housed in small cells with the lights on almost 24 hours per day until in or about March 2002. MDC staff deliberately turned on the air conditioner throughout the winter months, and turned on the heat during the summer months.

85. Plaintiffs were not provided with adequate bedding and personal hygiene items. Until in or about January 2002, Mr. ELMAGHRABY was not given a blanket, pillow, mattress, or any toilet paper. Similarly, Mr. IQBAL was never provided with pillows or more than one blanket.

86. Whenever Plaintiffs were removed from their cells, they were hand cuffed and shackled around their legs and waist.

87. Plaintiffs were subjected to continuous verbal abuse from the MDC staff, demonstrating their animus towards Plaintiffs. Such statements included Mr. IQBAL being called "a terrorist" by Defendant ZENK, "a terrorist and a killer" by Defendant GUSSAK, a "Mus-

lim bastard" by Defendant COTTON, and a "Muslim killer" by Defendant PEREZ. Mr. ELMAGHRABY was called a ["]terrorist" by Defendant SHACKS; when Mr. ELMAGHRABY requested a pair of shoes, Defendant THOMAS responded with a statement, "No shoes for a terrorist"; Defendant COTTON expressed the same animus when he said, "a terrorist should not ask for anything" to Mr. ELMAGHRABY.

88. Plaintiffs were rarely permitted to exercise, and the conditions under which they were permitted to exercise were punitive in effect and intent. For instance, when permitted to exercise in the winter, Plaintiffs were taken to the recreation areas in the ADMAX SHU, which were on the top floor of the MDC in the open-air, in early winter mornings without proper jackets and shoes.

89. On certain days when it rained, MDC officers took Mr. IQBAL to the recreation areas for exercise, and left him in the open-air for hours until he was completely drenched. When Mr. IQBAL was brought back to his cell, the officers deliberately turned on the air conditioner, causing him severe physical discomfort.

90. As the weather became milder, MDC officers permitted Mr. ELMAGHRABY to go to the recreation areas for his exercise. However, the officers permitted him to remain outside for only 15 minutes, in contrast to the cold winter months where the officers left Mr. ELMAGHRABY in the open-air for hours. In the summer months, when it was extremely hot and humid, MDC officers again left Mr. ELMAGHRABY outside for hours.

91. Moreover, Plaintiffs were not provided with adequate food. As a result of the harassment they exper-

ienced in the ADMAX SHU, and nutritionally inadequate food, Plaintiffs lost a significant amount of weight. While in custody, Mr. IQBAL lost over 40 pounds, and Mr. ELMAGHRABY lost over 20 pounds. Furthermore, as a result of not having adequate food for a prolonged period of time, Mr. IQBAL currently suffers from persistent digestive problems, causing him to require medical treatment.

92. Such conditions of confinement were punitive in intent and effect.

93. Such conditions of confinement were not related to any legitimate penological interest.

94. Such conditions of confinement were imposed without any individualized determination as to whether they were appropriate for Plaintiffs.

95. Indeed, the MDC's Segregation Review Officials, Defendants BLEDSOE, BECK, and ORTIZ, never conducted a weekly review of Plaintiffs' status regarding whether or not it was appropriate to continue to detain them in the ADMAX SHU. In addition, during the entire time Plaintiffs were housed in the ADMAX SHU, they never received a formal hearing to determine whether such confinement was appropriate. The MDC's Reviewing Authority, Defendant LOPRESTI, nonetheless continued to approve Plaintiffs' confinement in ADMAX SHU.

96. Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to these conditions of confinement as a matter of policy, solely on account of their religion, race,

and/or national origin and for no legitimate penological interest.

97. Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI willfully and maliciously designed a policy whereby individuals such as Plaintiffs were arbitrarily designated to be confined in the ADMAX SHU without providing any individual determination as to whether such designation was appropriate or should continue.

98. Keeping Plaintiffs in isolation for nearly 24 hours per day, without access to fresh air and light, adequate bedding, adequate heat, and without adequate recreation or exercise, bore no relationship to legitimate security concerns, constituted unjustified punishment, deprived Plaintiffs of their right to liberty, and amounted to the willful, malicious, and unnecessary infliction of pain and suffering.

99. As a result of Defendants' imposition of unlawful conditions of confinement, Plaintiffs suffered permanent physical injury and emotional distress.

Use of Excessive Force on Ehab Elmaghraby

100. Mr. ELMAGHRABY'S brutal mistreatment by MDC staff began on the first day he arrived at the facility on or about October 1, 2001, in the early morning hours, when Defendants BLEDSOE, ALAMO, CLARDY, JAIKISSOON, and MOORE willfully and maliciously threw Mr. ELMAGHRABY against a wall of the MDC, subjected him to repeated strip searches, including leaving him naked for approximately 40 minutes, and threatened him with death. Defendants BLEDSOE, ALAMO, CLARDY, JAIKISSOON, and MOORE contin-

ually accused Mr. ELMAGHRABY of being a terrorist and being associated with Osama bin Laden, Al Qaeda, and the Taliban. Moreover, when Mr. ELMAGHRABY was transported to court on the same day, Defendants BECK, CHASE, DEFRANCISCO, and DIAZ subjected Mr. ELMAGHRABY to repeated strip searches and willfully and maliciously dragged him on the ground while he was chained and shackled, causing him to bleed from his legs, and. [*sic*]

101. Upon Mr. ELMAGHRABY's return to the MDC, officers brought Mr. ELMAGHRABY up to AD-MAX SHU in an elevator. In the elevator, several officers, including Defendants BARRERE, BECK, ORTIZ, MUNDO, and OSTEEN willfully and maliciously physically and verbally assaulted him, causing him to bleed from his nose.

102. Although the officers carried a video camera with them while abusing Mr. ELMAGHRABY, they deliberately turned it off during the entire time the officers physically and verbally abused Mr. ELMAGHRABY.

103. The treatment by Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN on October 1, 2001, caused Mr. ELMAGHRABY to suffer excruciating pain and emotional distress.

104. Mr. ELMAGHRABY was assaulted a second time, on or about December 1, 2001, when he was willfully and maliciously pushed from behind by DOE No. 1 upon Mr. ELMAGHRABY's return from recreation.

105. As a result of being shoved, Mr. ELMAGHRABY hit his face on a hard surface and broke his teeth, causing him excruciating pain and emotional distress.

106. The beatings of Mr. ELMAGHRABY were motivated by Defendants' animus against Mr. ELMAGHRABY on account of his race, religion, and/or national origin.

107. There was no legal justification for the assaults and verbal abuse suffered by Mr. ELMAGHRABY.

108. The beatings of Mr. ELMAGHRABY by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

109. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to inflict unnecessary and assaultive beatings upon Mr. ELMAGHRABY, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

110. As a result of said willful, malicious, and unlawful conduct by Defendants, Mr. ELMAGHRABY suf-

fered severe and permanent physical injury and extreme emotional distress.

Use of Excessive Force on Javaid Iqbal

111. Consistent with Mr. ELMAGHRABY'S experience of physical abuse, Mr. IQBAL was subjected to brutal mistreatment from the very day he was transferred from general population to the ADMAX SHU on or about January 8, 2002, after he was brought back to the MDC from court.

112. On the day he was transferred to the ADMAX SHU, he was told by an officer on the fifth floor that he had a legal visit.

113. Mr. IQBAL was then taken to a room where Defendants DOE Nos. 2-16 were waiting for him. Several of these officers picked him up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room. In addition, the officers screamed at him, saying that he was a "terrorist" and a "Muslim."

114. Mr. IQBAL was then taken to the ADMAX SHU. While he was being moved, he was shackled and chained around his arms, legs, and waist.

115. From this incident, Mr. IQBAL suffered serious physical injuries, including bleeding from his mouth and nose, as well as severe emotional distress.

116. Mr. IQBAL was again assaulted on or about March 20, 2002, when Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18 ordered Mr. IQBAL to submit to a strip and body-cavity search.

117. The officers conducted three serial strip and body-cavity searches of Mr. IQBAL in the same room.

Although the officers had a handheld video camera, they turned it off while they conducted the searches.

118. Mr. IQBAL peacefully protested when the officers willfully and maliciously ordered him to submit to a fourth search.

119. In response, Defendant DEFRANCISCO punched Mr. IQBAL in the face and Defendant CUSH punched Mr. IQBAL in the back and his legs and kicked him in the back. As a result, Mr. IQBAL bled from his mouth. There was no legal justification for Defendants' brutal assault of Mr. IQBAL.

120. The officers next took Mr. IQBAL to the ADMAX SHU. En route to the ADMAX SHU, the officers continued to kick, physically harass, and verbally harass him by making racist and violent comments about Muslims.

121. When they arrived at the ADMAX SHU, Defendants DEFRANCISCO, CUSH, OSTEEN and DOE Nos. 17-18 willfully and maliciously pulled Mr. IQBAL's arm through the slot in his cell door, causing him excruciating pain.

122. Defendant DEFRANCISCO willfully and maliciously urinated in the cell in Mr. IQBAL'S toilet, and then turned the water off in the cell so that he could not flush the toilet. Mr. IQBAL was not able to flush the toilet until the next morning.

123. The beatings of Mr. IQBAL were motivated by Defendants' animus against Mr. IQBAL on account of his race, religion, and/or national origin.

124. The beatings of Mr. IQBAL by MDC staff were all pursuant to the customs and practices of the MDC.

Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

125. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to inflict unnecessary and assaultive beatings upon Mr. IQBAL, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

126. As a result of said willful, malicious, and unlawful conduct by Defendants, Mr. IQBAL currently suffers permanent physical and emotional injuries, including but not limited to limited hearing, permanent injury to his right leg, gastrointestinal problems, and depression.

Strip and Body Cavity Searches of Mr. Elmaghraby

127. Mr. ELMAGHRABY was subjected to numerous unreasonable, unnecessary and extreme strip and body-cavity searches while confined in the ADMAX SHU.

128. During the first three or four months of his detention, Mr. ELMAGHRABY was strip searched every morning. The officers ordered him to take off his clothes and inspected him through the slot in the door before

they entered the cell. Defendants BECK, GUSSAK, ORTIZ, BARRERE, DIAZ, MUNDO, OSTEEN, and ROSEBERRY willfully and maliciously subjected Mr. ELMAGHRABY to these strip searches, although they were not related to any legitimate security or penological interest.

129. Along with being strip searched every morning for the first several months of his detention, every time Mr. ELMAGHRABY went to court, and each time he returned to court, he was strip and body-cavity searched three times.

130. Upon leaving for court, the first search occurred in Mr. ELMAGHRABY'S cell in the ADMAX SHU, the second search in a different room in the ADMAX SHU, and the final search on the ground floor of MDC. When Mr. ELMAGHRABY returned from court, the searches occurred in reverse order. These searches occurred on or about the following dates: October 1, October 2, November 5, November 8, and December 11, 2001, and January 8, February 12, February 13, and July 22, 2002. During these searches, Mr. ELMAGHRABY was ordered to pass his clothes to a corrections officer and bend over while a corrections officer used a flashlight to search his body cavities.

131. None of these searches vindicated any legitimate security or penological interest. Indeed, the second and third searches were particularly egregious, because they were conducted even though Mr. ELMAGHRABY was in the custody of MDC employees from the moment he was first searched until after he was searched for the third time.

132. While the strip and body cavity-searches were conducted, Mr. ELMAGHRABY was threatened,

mocked and verbally abused. In addition, he was regularly pushed and shoved.

133. Defendants BECK, GUSSAK, ORTIZ, BARRERE, MUNDO, DIAZ, OSTEEN, and ROSEBERRY willfully and maliciously participated in and conducted the strip searches of Mr. ELMAGHRABY.

134. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS willfully and maliciously approved of, endorsed, and/or ordered that the searches take place as a matter of policy.

135. On many occasions, Defendants conducted the strip searches in an extreme and outrageous manner. For instance, on one occasion, Defendant BARRERE willfully and maliciously displayed Mr. ELMAGHRABY while naked to a female employee of the MDC. On or about October 1, 2001, while Defendants BECK, ORTIZ, MUNDO, and OSTEEN were present for a body-cavity search of Mr. ELMAGHRABY, Defendant BARRERE willfully and maliciously inserted a flashlight into Mr. ELMAGHRABY'S anal cavity. Mr. ELMAGHRABY noticed blood on the flashlight when it was removed from his anal cavity. On or about November 8, 2001, while Defendant DEFRANCISCO conducted a strip-search of Mr. ELMAGHRABY with other MDC officers, Defendant DEFRANCISCO inserted a pencil into Mr. ELMAGHRABY's anal cavity. Additionally, on or about January 8, 2002, Defendants MUNDO, COTTON, DEFRANCISCO, and OSTEEN conducted a strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY'S anal cavity.

Strip and Body Cavity Searches of Mr. Javaid Iqbal

136. As with Mr. ELMAGHRABY, Mr. IQBAL was also subjected to numerous unreasonable, unnecessary and extreme strip and body-cavity searches while confined in the ADMAX SHU.

137. Each morning, MDC corrections officers first searched Mr. IQBAL'S cell. During this search, Mr. IQBAL was chained and shackled and was routinely kicked and punched by MDC officers.

138. After the cell search, Mr. IQBAL was subjected to a strip and body-cavity search.

139. In addition to the daily strip and body-cavity searches, each time Mr. IQBAL visited the medical clinic for treatment, he was subjected to three strip searches, once before the medical visit and twice after the visit.

140. On days when he appeared in court, Mr. IQBAL was strip searched twice before he even left the building. As usual, Mr. IQBAL was subjected to a strip and cavity-search on or about 5:30 am. Mr. IQBAL was strip searched including a cavity search right before the MDC officers escorted him from his cell to the first floor of the building. The second search occurred on or about 7:40 am. When Mr. IQBAL returned from court, he also was subjected to two strip searches. These searches occurred on or about the following dates: February 19, 2002, March 6, 2002, March 20, 2002, and April 22, 2002.

141. Defendants BECK, BARRERE, ORTIZ, OSTEEN, PEREZ, ROSEBERRY, and DOE No. 19 willfully and maliciously participated in and conducted these strip searches.

142. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS willfully and maliciously approved of, endorsed, and/or ordered that these searches take place as a matter of policy.

143. On many occasions, Defendants conducted the strip searches in an extreme and outrageous manner. For instance, on or about March 20, 2002, Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18 ordered Mr. IQBAL to submit to a strip and body-cavity search.

144. The officers conducted three serial strip and body cavity searches of Mr. IQBAL in the same room. Although the officers had a handheld video camera, they turned it off while they conducted the searches.

145. Mr. IQBAL peacefully protested when the officers willfully and maliciously ordered him to submit to a fourth and completely unnecessary search.

146. In response Defendants assaulted Mr. IQBAL, as described in Pars. 116-122.

147. The strip search policy established and implemented by Defendants did not vindicate any legitimate security or penological interest.

148. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to unreasonable, unnecessary and extreme strip and body-cavity searches.

149. The imposition of unreasonable, unnecessary and extreme strip and body-cavity searches were all

pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

150. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to conduct unreasonable, unnecessary and extreme strip searches, and Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

151. Plaintiffs were subjected to unreasonable, extreme and unnecessary strip and body-cavity searches because of their race, religion, and/or national origin and for not [*sic*] legitimate penological purpose.

152. As a result of Defendants' actions, Plaintiffs suffered physical injury, extreme emotional distress, humiliation, and embarrassment.

Interference with Religious Practice

153. During the entire time that Plaintiffs were confined in the ADMAX SHU, their sincere religious practices and beliefs were constantly burdened and met

with interference. Such interference included banging on the cells when they were praying, routinely confiscating their Koran, and refusing to permit Plaintiffs to participate in Friday prayer services with fellow Muslims.

154. When Plaintiffs asked for Friday prayer services with fellow Muslims, they were met with comments such as, "No prayers for terrorists" by Defendant THOMAS and "Why do you need to pray when you are in jail? Go to sleep," by Defendant SHACKS.

155. Said interference was an undue burden on Plaintiffs' sincere religious practice and belief.

156. Moreover, the targeting of Plaintiffs for physical and verbal harassment and the imposition of restrictive conditions of confinement constituted an undue burden on Plaintiffs' sincere religious practice and belief.

157. Although Mr. ELMAGHRABY complained to Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE about the interference with his religious practice, said Defendants willfully and maliciously refused to take any action to remedy the situation.

158. Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON were each aware of the interference with Mr. IQBAL's religious practice, and nonetheless each Defendant agreed to, endorsed, and willfully and maliciously participated in the routine confiscation of his Koran.

159. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, con-

doned, and willfully and maliciously failed to prevent this interference with Plaintiffs' religious practice.

160. The interference with Plaintiffs' religious practice by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

161. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to interfere with Plaintiffs' religious practice, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

162. Defendants did not similarly interfere with the religious practice of non-Muslims.

163. As a result of Defendants' intentional interference with Plaintiffs' religious practice, each Plaintiff suffered extreme emotional distress.

Interference with Right to Counsel

164. Defendant COTTON was the counselor for the ADMAX SHU and determined whether and when detainees were permitted visitation or phone calls.

165. While in the ADMAX SHU, Plaintiffs' communication with their legal counsel was substantially interfered with by Defendants COTTON and SHACKS.

166. For instance, from on or about October 1, 2001, until in or about the last week of November 2001, Defendant COTTON prohibited Mr. ELMAGHRABY from speaking by telephone with his criminal defense attorney.

167. After in or about November 2001, on those occasions when Mr. ELMAGHRABY was permitted to speak with his criminal attorney, Defendant COTTON stood nearby and disconnected the phone when Mr. ELMAGHRABY complained about any of the conditions of his confinement in the ADMAX SHU.

168. Similarly, on those occasions when Mr. IQBAL was permitted to speak with his criminal attorney, Defendant COTTON stood nearby and disconnected the phone if Mr. IQBAL complained about any of the conditions of his confinement in the ADMAX SHU.

169. When Mr. ELMAGHRABY's attorney tried to visit him at the MDC, she often waited for hours without seeing Mr. ELMAGHRABY.

170. On those occasions when Mr. ELMAGHRABY was able to meet with his attorney at the MDC, a video camera recorded the visit and when he returned to his cell, he would find that it had been ransacked. On these occasions, even though his legal visit was non-contact, Mr. ELMAGHRABY was forced to submit to a strip search.

171. Mr. IQBAL's attorney was turned away from the MDC several times, being falsely informed that Mr. IQBAL had been transferred to another facility. Addi-

tionally, Defendant SHACKS routinely delayed Mr. IQBAL's receipt of legal mail, sometimes by up to two months.

172. As a result, Plaintiffs' communication with counsel was substantially interfered with.

173. Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, COTTON and SHACKS each knew of and condoned the imposition of substantial restrictions on Plaintiffs' right to communicate with counsel.

174. The imposition of these restrictions was all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

175. Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to substantially interfere with Plaintiffs' right to counsel, and Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

176. Plaintiffs' right to communicate with counsel was interfered with because of their race, religion, and/or national origin.

177. As a result of Defendants' actions, Plaintiffs suffered extreme emotional distress.

Deliberate Indifference to Serious Medical Needs

178. Both Plaintiffs also were denied access to constitutionally adequate medical care.

179. On or about December 1, 2001, Mr. ELMAGHRABY was pushed from behind by Defendant DOE No. 1, upon Mr. ELMAGHRABY's return from recreation.

180. As a result of being shoved, Mr. ELMAGHRABY hit his face on a hard object and broke his teeth.

181. Defendant LORENZO provided Mr. ELMAGHRABY with antibiotics for his injury, but they were confiscated by Defendant ORTIZ when Mr. ELMAGHRABY returned to the ADMAX SHU.

182. Mr. ELMAGHRABY complained to Defendant SHACKS, who asked Mr. ELMAGHRABY why he needed his teeth.

183. As a result of Defendants' mistreatment, Mr. ELMAGHRABY suffered extreme pain and emotional distress.

184. Moreover, while Mr. ELMAGHRABY was confined in the ADMAX SHU, Defendant LORENZO erroneously diagnosed him with asthma and prescribed him with asthma medication.

185. As a result of Defendant LORENZO's misdiagnosis, Mr. ELMAGHRABY's actual condition, hypothyroid, became worse and he had to undergo surgery to correct the problem.

186. As a result of this cruel and inhuman treatment, Mr. ELMAGHRABY suffered and continues to suffer severe emotional distress, as well as persistent physical injuries.

187. On or about March 21, 2002, the day after Mr. IQBAL had been beaten by Defendants CUSH and DEFRANCISCO, as described in Pars. 116-122, Mr. IQBAL requested medical assistance from Defendant LORENZO. Defendant SHACKS, however, told Defendant LORENZO to leave the ADMAX SHU without providing any medical assistance, and Defendant COTTON also refused Mr. IQBAL's requests for medical assistance.

188. Mr. IQBAL did not receive any medical care for two weeks after he was brutally assaulted, despite the fact that he was experiencing excruciating pain and suffering.

189. Defendants LORENZO, COTTON, ORTIZ, and SHACKS willfully and maliciously failed and refused to provide adequate medical care to Plaintiffs. Said deficiencies in the provision of adequate medical care include but are not limited to the following: Defendants LORENZO, COTTON, and SHACKS's refusal to provide treatment to Mr. IQBAL until about two weeks after he was assaulted on or about March 20, 2002; Defendant LORENZO's failure to properly diagnose Mr. ELMAGHRABY's hypothyroid condition; and Defendants ORTIZ and SHACKS's confiscation of the antibiotics prescribed by Defendant LORENZO as a result of the brutal assault of Mr. ELMAGHRABY on or about December 1, 2001.

190. Defendants LORENZO, COTTON, ORTIZ, and SHACKS, acting under color of federal law, by their ac-

tions and/or omissions, willfully and maliciously demonstrated deliberate indifference to Plaintiffs' life and safety and/or serious medical needs.

191. Defendants LORENZO, COTTON, ORTIZ, and SHACKS, acting under color of federal law, by their actions and/or omissions, willfully and maliciously denied Plaintiffs' life, liberty, and/or property without due process of law.

192. Defendants LORENZO, COTTON, ORTIZ, and SHACKS each knew or should have known of the deficiencies alleged herein which were within his/her jurisdiction.

193. Defendants LORENZO, COTTON, ORTIZ, and SHACKS each knew or should have known that there was a foreseeable risk of serious harm as a result of the deficiencies alleged herein.

General Allegations

194. Defendants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19 each knew of, participated in, and willfully and maliciously subjected Plaintiffs to the mistreatment described herein.

195. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY,

SHACKS, LORENZO, and DOE Nos. 1-19 were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement.

196. The repeated beatings and mistreatment of Plaintiffs were pursuant to the policy and practice of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

197. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to subject Plaintiffs to the beatings and other mistreatment described herein, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

198. Defendants specifically targeted Plaintiffs for mistreatment because of Plaintiffs' race, religion, and/or national origin.

199. Defendants' conduct imposed an undue burden on Plaintiffs' sincere religious belief and practice.

200. As a result of Defendants' malicious, willful, and unlawful conduct, Plaintiffs suffered severe and permanent physical injuries and severe emotional distress.

FIRST CAUSE OF ACTION

(Conditions of Confinement—Fifth Amendment Due Process)

201. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 200.

202. By willfully and maliciously subjecting Plaintiffs to outrageous, excessive, cruel, inhuman and degrading conditions of confinement, including the denial of adequate nutrition, the denial of adequate exercise, the imposition of unnecessary and unlawful strip and body-cavity searches, extended detention in solitary confinement, and subjection to unprovoked and unjustified physical and emotional abuse, Defendants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, acting under color of law and their authority as federal officers, have deprived Plaintiffs of liberty and/or property without due process of law in violation of the Fifth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy Plaintiffs' mistreatment, have deprived Plaintiffs of liberty and/or property without due process of law in violation of the Fifth Amendment to the United States Constitution.

203. As a result of Defendants' unlawful conduct, Plaintiffs have suffered severe pain and suffering, including physical injuries, emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff

is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SECOND CAUSE OF ACTION

(Assignment to ADMAX SHU—Fifth Amendment Due Process)

204. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 203.

205. By willfully and maliciously adopting, promulgating and implementing the policy and practice under which Plaintiffs were confined to solitary confinement in the ADMAX SHU in an arbitrary and unreasonable manner, without any defined criteria, contemporaneous review, or process of any sort, and by which classifications Plaintiffs experienced unnecessary and unreasonable restrictions on their liberty that were atypical and significant departures from the restrictions imposed upon detainees in general population, Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BECK, BLEDSOE, ORTIZ, and SHACKS, acting under color of law and their authority as federal officers, have intentionally or recklessly deprived Plaintiffs of liberty without due process

of law in violation of the Fifth Amendment to the United States Constitution.

206. As a result of Defendants' unlawful conduct, Plaintiffs suffered emotional distress humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BECK, BLEDSOE, ORTIZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(Excessive Force—Fifth Amendment Due Process)

207. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 206.

208. The unprovoked, unjustified, willful, and malicious intentional beatings of Plaintiffs by Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18 deprived Plaintiffs of their right to liberty and property in violation of the Fifth Amendment to the United State [*sic*] Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, deprived Plaintiffs of their right to liberty and property in violation of the Fifth Amendment to the United States Constitution.

209. As a proximate result of the excessive force wielded against them, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great pain and suffering, both mental and physical, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
(Excessive Force—Eighth Amendment Cruel and Unusual Punishment)

210. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 209.

211. The unprovoked, unjustified, willful, and malicious intentional beatings of Plaintiffs by Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18 constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, violated the Eighth Amendment's prohibition against cruel and unusual punishment.

212. As a proximate result of the excessive force wielded against them, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great pain and suffering, both mental and physical, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FIFTH CAUSE OF ACTION
(Interference with Right to Counsel—Sixth Amendment)

213. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 212.

214. By willfully and maliciously adopting, promulgating, failing to prevent, failing to remedy, and/or implementing the policy and practice under which Plaintiffs' access to counsel was substantially interfered with, Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, and COTTON violated Plaintiffs' right to counsel guaranteed by the Sixth Amendment of the United States Constitution.

215. As a result of Defendants' unlawful conduct, Plaintiffs have suffered emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS,

and COTTON jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SIXTH CAUSE OF ACTION
(Denial of Medical Treatment—Fifth Amendment Due Process)

216. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 215.

217. By denying Plaintiffs their right to adequate medical examination and care, Defendants LORENZO, COTTON, ORTIZ, and SHACKS deprived Plaintiffs of their liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

218. As a result of Defendants' unlawful conduct, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great emotional distress and physical pain and suffering, and accordingly each Plaintiff is entitled to compensatory damages against LORENZO, COTTON, ORTIZ, and SHACKS jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SEVENTH CAUSE OF ACTION
(Denial of Medical Treatment—Eighth Amendment Cruel and Unusual Punishment)

219. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 218.

220. By denying Plaintiffs their right to adequate medical examination and care, Defendants LORENZO, COTTON, ORTIZ, and SHACKS exhibited deliberate indifference to Plaintiffs' serious medical needs in violation of the Eighth Amendment to the United States Constitution.

221. As a result of Defendants' unlawful conduct, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great emotional distress and physical pain and suffering, and accordingly each Plaintiff is entitled to compensatory damages against LORENZO, COTTON, ORTIZ, and SHACKS jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

EIGHTH CAUSE OF ACTION
(Conditions of Confinement—Eighth Amendment Due Process)

222. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 221.

223. By willfully and maliciously subjecting Plaintiffs to outrageous, excessive, cruel, inhuman and degrading conditions of confinement, including the denial of adequate nutrition, the denial of adequate exercise, the imposition of unnecessary and unlawful strip and body-cavity searches, extended detention in solitary confinement, and subjection to unprovoked and unjustified physical and emotional abuse, Defendants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON,

MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, and DOE Nos. 1-19, acting under color of law and their authority as federal officers, subjected Plaintiffs to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy Plaintiffs' mistreatment, subjected Plaintiffs to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

224. As a result of Defendants' unlawful conduct, Plaintiffs have suffered severe pain and suffering, including physical injuries, emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

NINTH CAUSE OF ACTION
(Unreasonable Strip and Body Cavity-Searches—Fourth Amendment)

225. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 224.

226. By willfully and maliciously adopting, promulgating, failing to prevent, failing to remedy, and/or im-

plementing the policy and practice under which Plaintiffs were repeatedly subjected to unreasonable and unjustified strip and body-cavity searches, Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19 subjected Plaintiffs to unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution.

227. As a result of Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19's unlawful conduct, Plaintiffs suffered physical injuries, emotional distress, humiliation, and embarrassment. Plaintiffs are therefore entitled to compensatory damages against SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

TENTH CAUSE OF ACTION
(Interference With Religious Practice—First Amendment)

228. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 227.

229. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of interfering with Plaintiffs' religious practices, violated Plaintiffs' rights under the First Amendment to the United States Constitution.

230. As a result, Plaintiffs suffered extreme emotional distress and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

ELEVENTH CAUSE OF ACTION
(Discrimination Against Muslims—First Amendment)

231. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 230.

232. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' sincere religious beliefs violated Plaintiffs' rights under the First Amendment to the United States Constitution.

233. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

TWELFTH CAUSE OF ACTION
(Race Discrimination—Fifth Amendment Equal Protection)

234. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 233.

235. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' race violated Plaintiffs' rights under the Fifth Amendment to the United States Constitution.

236. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE,

MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

THIRTEENTH CAUSE OF ACTION
(Conditions of Confinement—RFRA)

237. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 236.

238. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' sincere religious beliefs, substantially burdened Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1.

239. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory

damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FOURTEENTH CAUSE OF ACTION
(Interference With Religious Practice—RFRA)

240. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 239.

241. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of confiscating Plaintiffs' religious materials, regularly interrupting Plaintiffs' daily prayers, and denying Plaintiffs access to Friday prayers, substantially burdened Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1.

242. As a result, Plaintiffs suffered extreme emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, SHACKS, and COTTON jointly and severally in an amount to be determined at trial and punitive damages

against each Defendant in an amount to be determined at trial.

FIFTEENTH CAUSE OF ACTION
(Excessive Force—RFRA)

243. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 242.

244. Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, by brutally beating and verbally abusing Plaintiffs because of Plaintiffs' sincere religious beliefs, imposed a substantial burden on Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1. Defendants, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, acted in violation of 42 U.S.C. §§ 2000bb-1.

245. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, SHACKS, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SIXTEENTH CAUSE OF ACTION
(Religious Discrimination—42 U.S.C. § 1985(3))

246. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 245.

247. Defendants, by engaging in the following conduct, agreed to deprive Plaintiffs of the equal protection of the laws and of equal privileges and immunities of the laws of the United States because of Plaintiffs' sincere religious belief, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3): Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessarily harsh conditions of confinement in ADMAX SHU without due process of law; Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN's agreement to brutally mistreat Mr. ELMAGHRABY on or about October 1, 2001; Defendants DOE Nos. 2-16's agreement to brutally assault Mr. IQBAL on or about January 8, 2002; Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18's agreement to subject Mr. IQBAL to unnecessary strip and body-cavity searches on or about March 20, 2002, and brutally beat him in response to his peaceful protest of the searches; Defendants BECK, ORTIZ, BARRERE, MUNDO, and OSTEEN's agreement on or about October 1, 2001 to conduct an extreme and cruel body-cavity search of Mr. ELMAGHRABY during which Defendant BARRERE willfully and maliciously inserted a flashlight into Mr. ELMAGHRABY's anal cavity; Defendants MUNDO,

COTTON, DEFRANCISCO, and OSTEEN's agreement on or about January 8, 2002 to conduct an extreme and cruel strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY's anal cavity; Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON's agreement to routinely confiscate Mr. IQBAL's Koran; and Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE's agreement to substantially burden Mr. ELMAGHRABY's religious practice while he was housed in ADMAX SHU.

248. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, SHACKS, and DOE Nos. 2-18 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SEVENTEENTH CAUSE OF ACTION
(Race and National Origin Discrimination—42 U.S.C. § 1985(3))

249. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 248.

250. Defendants, by engaging in the following conduct, agreed to deprive Plaintiffs of the equal protection of the laws and of equal privileges and immunities of the laws of the United States because of Plaintiffs' race and/or national origin, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3): Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessarily harsh conditions of confinement in ADMAX SHU without due process of law; Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN's agreement to brutally mistreat Mr. ELMAGHRABY on or about October 1, 2001; Defendants DOE Nos. 2-16's agreement to brutally assault Mr. IQBAL on or about January 8, 2002; Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18's agreement to subject Mr. IQBAL to unnecessary strip and body-cavity searches on or about March 20, 2002, and brutally beat him in response to his peaceful protest of the searches; Defendants BECK, ORTIZ, BARRERE, MUNDO, and OSTEEN's agreement on or about October 1, 2001 to conduct an extreme and cruel body-cavity search of Mr. ELMAGHRABY during which Defendant BARRERE willfully and maliciously inserted a flashlight into Mr.

ELMAGHRABY's anal cavity; Defendants MUNDO, COTTON, DEFRANCISCO, and OSTEEN's agreement on or about January 8, 2002 to conduct an extreme and cruel strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY's anal cavity; Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON's agreement to routinely confiscate Mr. IQBAL's Koran; and Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE's agreement to substantially burden Mr. ELMAGHRABY's religious practice while he was housed in ADMAX SHU.

251. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, SHACKS, and DOE Nos. 2-18 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

EIGHTEENTH CAUSE OF ACTION
(Assault and Battery—FTCA)

252. Plaintiff IQBAL repeats and reallege [*sic*] as if fully set forth herein the allegations contained in paragraphs numbered 1 through 251.

253. Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18, by kicking, punching, and beating Plaintiff IQBAL without consent, intentionally caused offensive and harmful contact with Plaintiff IQBAL, so as to constitute battery under the laws of New York State, where the relevant acts took place. The batteries committed upon Plaintiff IQBAL were not related to any penological interest. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by negligently failing to take reasonable measures to prevent and/or remedy their subordinates' abuse of Plaintiff IQBAL, violated the laws of New York State.

254. In committing the unprovoked and unjustified batteries upon Plaintiff IQBAL in a willful and malicious manner, Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18 placed Plaintiff IQBAL in imminent apprehension of offensive and harmful contact, so as to constitute assault under the laws of New York State.

255. Defendants ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18 were acting within the scope of their employment by the United States when Plaintiff IQBAL was subjected to the batteries

and were working as law enforcement officers as defined by 28 U.S.C. § 2680(h).

256. Pursuant to 28 U.S.C. § 2675(a), the claims set forth herein were timely presented to the Bureau of Prisons on November 3, 2003 and the said claims were denied on April 27, 2004.

257. As a proximate result of the assault and batteries committed against him, Plaintiff IQBAL sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiff IQBAL great pain and suffering, both mental and physical, and accordingly he is entitled to compensatory damages against the UNITED STATES OF AMERICA in an amount to be determined at trial.

NINTEENTH [*sic*] CAUSE OF ACTION
(Negligent Denial of Medical Treatment—FTCA)

258. Plaintiff IQBAL repeats and realleges as if fully set forth herein the allegations contained in paragraphs numbered 1 through 257.

259. By refusing to provide Plaintiff IQBAL with adequate medical examination and care, Defendants LORENZO, COTTON, SHACKS, acting under color of federal law and their authority as federal officers, have breached their duty under 18 U.S.C. § 4042(a)(2) to take ordinary diligence or reasonable care to keep Plaintiff IQBAL safe and free from harm, so as to constitute negligence under the laws of New York State, where the relevant actions took place.

260. Pursuant to 28 U.S.C. § 2875(a), the claims set forth herein were timely presented to the Bureau of Prisons on November 3, 2003 and the said claims were denied on April 27, 2004.

261. As a result of Defendants' unlawful conduct, Plaintiff IQBAL sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiff IQBAL great emotional distress and physical pain and suffering, and accordingly Plaintiff is entitled to compensatory damages against the UNITED STATES OF AMERICA in an amount to be determined at trial.

TWENTIETH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress—FTCA)

262. Plaintiff IQBAL repeats and realleges as if fully set forth herein the allegations contained in paragraphs numbered 1 through 261.

263. Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18, acting under color of law and their authority as federal officers, maliciously subjected Plaintiff IQBAL to outrageous conduct of repeated instances of assault and batteries, extreme strip and body cavity-searches, the denial of medical treatment and adequate nutrition, extended detention in solitary confinement, deliberate interference with their rights to counsel and to exercise of their religious beliefs and practices with the intent to causing [*sic*] and reckless disregard of a substantial probability of causing several emotional distress and physical pain and suffering. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, by negligently failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiff IQBAL violated the laws of New York State.

264. Pursuant to 28 U.S.C. § 2875(a), the claims set forth herein were timely presented to the Bureau of

Prisons on November 3, 2003 and the said claims were denied on April 27, 2004.

265. As a result, Plaintiff IQBAL suffered extreme and lasting emotional distress, humiliation, embarrassment, and permanent physical injuries, and accordingly is entitled to compensatory damages against the UNITED STATES OF AMERICA in an amount to be determined at trial.

TWENTY-FIRST CAUSE OF ACTION
(Cruel, Inhuman, or Degrading Treatment—Customary International Law[])

266. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 265.

267. The acts described herein had the intent and the effect of grossly humiliating Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and moral resistance.

268. The acts described herein constituted cruel, inhuman or degrading treatment in violation of the law of the nations under the Alien Tort Claims Act, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting cruel, inhuman or degrading treatment as reflected, expressed, and defined in multilateral treaties and other international treatments, international and domestic judicial decisions.

269. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE,

CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19 are liable for said conduct in that Defendants, acting under the color of law and their authority as federal officers, directed, ordered, confirmed, ratified and/or conspired to cause cruel, inhuman or degrading treatment of Plaintiffs.

270. Plaintiffs were forced to suffer severe physical and psychological abuse and emotional distress and are entitled to monetary damages.

JURY DEMAND

Plaintiffs demand a trial by jury. Plaintiff IQBAL does not demand trial by jury for his claims arising under the FTCA.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that a judgment be granted as follows:

a. Awarding compensatory and punitive damages to Plaintiffs for Defendants' violations of constitutional law, federal statutory law, customary international law, and local law, which caused Plaintiffs to suffer physical and emotional harm, in an amount that is fair, just, reasonable and in conformity with the evidence;

b. Awarding Plaintiffs attorney's fees and costs pursuant to 42 U.S.C. § 1988 and N.Y.C. Code § 8-502; and,

c. Such other relief as this Court deems just and proper.

Dated: New York, New York
September 30, 2004

THE URBAN JUSTICE CENTER
and KOOB & MAGOOLAGHAN

By: /s/ ALEXANDER A. REINERT

ALEXANDER A. REINERT
(AR-1740)
Koob & Magoolaghan
South Street Seaport
19 Fulton Street, Suite 408
New York, New York 10038
Tel: 212-406-3095

-and-

Haeyoung Yoon (HY-8962)
Urban Justice Center
666 Broadway, 10th floor
New York, New York 10012
Tel: 646-459-3003

Attorneys for Plaintiffs

OPPOSITION BRIEF

No. 07-1015

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

DAVID J. BALL
RIMA J. OKEN
WEIL, GOTSHAL, & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8323

ALEXANDER A. REINERT
Counsel of Record
JOAN M. MAGOOLAGHAN
ELIZABETH L. KOOB
KOOB & MAGOOLAGHAN
221 Devoe Avenue
Yonkers, NY 10705
(914) 964-8888

Counsel for Respondent

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IN THE

Supreme Court of the United States

No. 07-1015

JOHN D. ASHCROFT AND ROBERT MUELLER,
Petitioners,

v.

JAVAID IQBAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Petitioners seek certiorari on two questions: (1) whether a "high-ranking official" may be subject to discovery in a *Bivens*[1] lawsuit based on a "conclusory" allegation that the official knew, condoned, or agreed to subject a plaintiff to unconstitutional acts carried out by subordinates; and (2) whether a supervisory official may be held liable because of the official's "constructive notice" of the unconstitutional acts of subordinates. Pet. (I). There is no circuit split as to the first question, and the Second Circuit's decision correctly applied relevant pleading jurisprudence. Petitioners never raised the second question below, and even had they raised it, it would have

[1] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

been unnecessary to reach because of the procedural posture of this case. Ultimately, then, the petition argues that the Second Circuit erred in applying Rule 8 pleading standards – an insufficient ground for certiorari. For these reasons and others that make this case a poor vehicle to address the questions sought to be presented by petitioners, respondent respectfully requests that the petition be denied.

STATEMENT

1. Beginning in January 2002, respondent Javaid Iqbal was held for more than 150 days in a maximum security unit in Brooklyn, New York's Metropolitan Detention Center ("MDC") that was known as the "ADMAX SHU"—short for Administrative Maximum Special Housing Unit. He was held there because he was presumptively categorized as "of high interest" to the September 11th investigations, solely because of his race, religion, and national origin, and for no legitimate reason. App. 164a-165a, 172a-173a (Compl. ¶¶ 48-53, 96). On the ADMAX SHU, Mr. Iqbal was subjected to solitary confinement, unnecessary and abusive strip searches, and beaten by correction officers, among other abusive conditions. *Id.* 166a, 170a-171a, 176a-177a, 181a-187a (Compl. ¶¶ 60, 63, 84, 87, 89, 113, 116-17, 120, 122, 137-148, 153-54, 158, 168, 171). The only reason respondent was confined in the ADMAX SHU was because of his race, religion, and national origin. *Id.* 172a-173a (Compl. ¶ 96.)

After he was deported, along with Ehab Elmaghraby,[2] Mr. Iqbal subsequently brought this lawsuit, seeking compensation for the central role that petitioners and other federal officials played in subjecting him to harsh conditions of confinement. Mr. Iqbal brought claims under *Bivens*, *supra*, for violations of his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims.

2. The complaint alleges that specific defendants crafted, directed, and implemented practices and procedures regarding the confinement of "high interest" detainees in the ADMAX SHU. Among these officers were petitioners, former Attorney General John D. Ashcroft and current Director of the Federal Bureau of Investigation ("FBI") Robert Mueller, who crafted, approved, and directed the implementation of the discriminatory policies challenged herein. *See infra* 11-12. Petitioners knew, condoned, and agreed "as a matter of policy" that detainees like respondent would be confined in the ADMAX SHU solely because of membership in protected classes. App. 172a-173a (Compl. ¶ 96).

3. Prior to engaging in discovery, in October 2004, several defendants and petitioners filed motions to dismiss respondent's complaint. Among other arguments, petitioners asserted that the complaint should be dismissed under Rule 12(b)(6) on ground of qualified immunity. The district court dismissed some of respondent's statutory claims, but

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[2] On behalf of all defendants, the United States settled claims with Mr. Elmaghraby for $300,000 prior to the Second Circuit's decision. Thus, it can hardly be said, as *amici* suggest, that the claims advanced here are "insubstantial." (Br. *Amici Curiae* of William P. Barr, et al., at 10).

permitted each of his *Bivens* claims to proceed. *Id.* 71a-150a. The court noted that "the post-September 11 context" supported respondent's assertion of petitioners' personal involvement, and that "some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved." *Id.* 116a-118a. Reasoning that Mr. Iqbal "should not be penalized for failing to assert more facts" given that the extent of defendants' respective "involvement is peculiarly within their own knowledge," *id.* 118a, the court concluded that the facts alleged in respondent's complaint were sufficient.[3] Eight defendants then noticed appeals to the Second Circuit Court of Appeals.

4. A panel of the Second Circuit affirmed the district court's opinion in large part. *Id.* 1a-70a. As to petitioners, the appellate court found that respondent's discrimination-based claims should proceed. *Id.* 58a-63a. The court rejected petitioners' argument that the complaint did not adequately state a discrimination claim because of the following allegations: (1) petitioners "specifically targeted" respondent for mistreatment because of his race, religion and national origin; (2) petitioners adopted the policies and practices challenged in the instant case; (3) the FBI's arrest of thousands of Arab Muslims was "under the direction of Defendant Mueller"; and (4) petitioners knew of, condoned and agreed to subject

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[3] The district court also found support for respondent's allegations in the Government's own investigation of the treatment of September 11th detainees at the MDC. *Id.* 116a n.20. As the district court found, the April 2003 report suggested that petitioners were personally involved in "creating or implementing" the policies that led to respondent's confinement in the ADMAX SHU. *Id.*

respondent to harsh conditions of confinement solely because of his membership in protected classes and not for any legitimate reason. The court also held that petitioners were not "necessarily insulate[d]" from liability simply because subordinates classified respondent as "of high interest," because petitioners likely "concerned themselves with the formulation and implementation of policies dealing with the confinement of those . . . designated 'of high interest' in the aftermath of 9/11." *Id.* 59a, 62a.

The Court of Appeals also made several critical legal conclusions. First, the Second Circuit correctly interpreted this Court's decisions in *Leatherman*[4] and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) to mean that heightened pleading standards are inappropriate absent authorization from a statute or the Federal Rules. App. 162a-163a. Second, it interpreted this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), to require a "pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* 170a (emphasis in original). Third, to the extent that a defendant believes that *some* elements of a plaintiff's claim are based on "conclusory" allegations, the Second Circuit pointed to Fed. R. Civ. P. 12(e) as a remedy, consistent with this Court's suggestion in *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).[5] App. 172a.

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[4] *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

[5] The Second Circuit found that the allegations made against petitioners were not "conclusory" and were sufficient on their own, without any allegation of subsidiary facts, to establish respondent's entitlement to discovery on his discrimination claims. App. 62a.

Finally, the court provided explicit guidance to the district court to oversee discovery with an eye towards preserving the substance of the qualified immunity defense. App. 172a-173a (suggesting that district court examine responses to paper discovery prior to permitting depositions, defer discovery of high level officials until other defendants have testified, and permit motions for summary judgment on qualified immunity grounds after "carefully targeted discovery" aimed at discovering the personal knowledge and involvement of individual defendants). Petitioners have refused to avail themselves of the opportunities presented by the Federal Rules, and amplified by the Second Circuit, to obtain further specification of the basis for respondent's claims.

5. Petitioners' first question presented implicates the application of pleading standards to the complaint in the instant case. The longstanding federal rule, embodied by the decision below, is that complaints need only meet the standards set forth in Rule 8, unless a statute imposes a higher pleading standard, or the subject matter falls into the particularized requirements of Fed. R. Civ. P. 9. *Leatherman*, 507 U.S. at 168-169; *Swierkiewicz*, 534 U.S. at 514-515; *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam). As this Court has emphasized numerous times, "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Hill v. McDonough*, 547 U.S. 573, 582 (2006). In the absence of a specific heightened pleading requirement, "ordinary pleading rules are not meant to impose a great burden." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The Rule 8 standard is satis-

fied if a complaint gives "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 512 (internal quotation marks omitted). "Fair notice" is that which will enable the defendant to answer and prepare for trial. 5 Wright & Miller, Federal Practice & Proc. § 1215. In a garden variety negligence action, for example, it is sufficient to state that on a given date and a given place, "defendant negligently drove a motor vehicle against plaintiff." *Swierkiewicz*, 534 U.S. at 513 n.4 (*quoting* Fed. R. Civ. P. Form 9). In the more closely analogous Title VII context, it is sufficient to allege that an adverse employment action was taken "on account of" prohibited factors. *Swierkiewicz*, 534 U.S. at 514. Thus, under Rule 8, a complaint need not identify the exact nature or mechanism of the defendant's misfeasance to state a claim. And, critically, to the extent a complaint alleges a defendant's state of mind, such as knowledge or intent, it may be averred "generally," without any subsidiary facts. Fed. R. Civ. P. 9(b).

As the Second Circuit recognized, this Court's decision in *Bell Atlantic* did not alter these fundamental rules. *Bell Atlantic* reaffirmed *Swierkiewicz*, and with it the rejection of any heightened pleading standards imposed by judicial fiat. 127 S. Ct. at 1973-1974 & n.14. Rather than require detailed fact pleading, the Court simply held that the facts alleged, taken as true, have to plausibly suggest relief. *Id.* at 1964 (not requiring "detailed factual allegations"); *id.* at 1973 n.14. And where a complaint alleges facts that are consistent with both legal and illegal conduct, as did the complaint in *Bell Atlantic*, Rule 8 simply requires some additional allegation that pushes the complaint into the realm of "plausi-

bility." *Id.* at 1972-1973. Thus, *Bell Atlantic* disclaimed any intention to radically alter the Rule 8 pleading standard.

That *Bell Atlantic* worked no significant change to Rule 8 pleading standards is evidenced by the Court's per curiam disposition of a Section 1983 complaint in *Erickson*. In *Erickson*, the lower court had dismissed a prisoner's claim of deliberate indifference to serious medical needs because the prisoner had failed to allege that he suffered any particular harm as a result of a denial of medical treatment. 127 S. Ct. at 2199. The Court reversed this disposition, finding that an allegation that the denial of care was endangering the prisoner's life was sufficient, without more, to state a claim. *Id.* at 2200. In so doing, the Court reemphasized that such a contention, albeit lacking specifics, was not "too conclusory" to provide fair notice of the substance of the claim, and that "[s]pecific facts are not necessary." *Id.* (citing *Bell Atlantic* and *Swierkiewicz*).

6. Petitioners' second question presented implicates standards for supervisory liability in civil rights actions. Although this Court has not defined the precise contours of supervisory liability in *Bivens* or section 1983 actions, there are many areas of agreement between the parties in this case. First, it is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*. Second, and relatedly, all agree that a supervisor must take some affirmative act (or legally actionable omission) that contributes to or causes the constitutional violation alleged by a plaintiff. App. 14a. Third, petitioners agree that a supervisor's knowing acquiescence to subordinates' unconstitutional conduct is enough to establish supervisory li-

ability. Pet. 29-31. Finally, if a supervisor takes affirmative steps to create a facially unconstitutional policy, to be applied by subordinates, this too will establish supervisory liability. *Cf.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992). As will be discussed below, the Second Circuit's decision is consistent with all of these principles.

REASONS FOR DENYING THE PETITION

Petitioners argue that certiorari is appropriate to resolve (1) whether a "conclusory allegation" that a "high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state" a *Bivens* claim; and (2) whether a "high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Pet. (I). Neither question is certworthy, for similar reasons. First, petitioners' questions implicitly concede that a complaint should not be dismissed if it adequately alleges petitioners' actual, subjective knowledge of and acquiescence to discrimination by subordinates. And because petitioners do not claim to argue for a new or different pleading standard to be applied in this *Bivens* action, the petition ultimately boils down to an argument that the Second Circuit did not properly apply *Bell Atlantic*'s "plausibility" standard to the allegations of actual knowledge in the complaint. In other words, the petition seeks error correction of the Second Circuit and nothing more, an inadequate ground for certiorari, espe-

cially because the Second Circuit's decision faithfully adhered to this Court's precedents.

Relatedly, the alleged circuit split as to the first question is nonexistent because petitioners do not show a split as to legal analysis. In fact, none of the circuits identified by petitioners has expressed disagreement with the Second Circuit's analysis in *Iqbal*. And the alleged circuit split on the second question – the standard for supervisory liability where constructive, rather than actual, knowledge is alleged in *Bivens* actions – is not implicated by this case because the motion to dismiss standard requires a court to take as true respondent's allegations of *actual subjective* knowledge. Thus, while petitioners do an admirable job of creating the suggestion of relevant circuit splits, any tension identified by petitioners is irrelevant in the context of this case.

Even were the Court to overlook each of these failings, this interlocutory appeal is a poor vehicle for answering either question. Petitioners concede that they did not even raise the second question in the courts below, and there are additional substantial questions regarding the Court's jurisdiction to reach the issues presented. Moreover, even if the Court were to determine that the complaint's allegations provide insufficient notice to petitioners under the *Bell Atlantic* standard, ample facts have been uncovered through ongoing discovery to allow for a sufficiently detailed amendment to the pleadings. Therefore, in this particular case, granting the petition would only delay this case further to no apparent purpose.

I. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT AND SISTER CIRCUITS CONCERNING THE ALLEGATIONS NECESSARY TO OVERCOME THE QUALIFIED IMMUNITY DEFENSE AT THE MOTION TO DISMISS STAGE

Petitioners make three arguments why this Court should address the question of what allegations are sufficient to establish actual subjective knowledge of a "high-ranking" official: that (1) the Second Circuit's decision that the complaint sufficiently alleges actual knowledge is inconsistent with *Crawford-El* and *Swierkiewicz*; (2) the decision below conflicts with four other courts of appeals "faced with similar facts"; and (3) the Second Circuit's approach deprives those defendants who most need them of the "important protections" of qualified immunity. Pet. 11. As will be shown below, the only real issue presented by petitioners' first question is whether the Second Circuit properly held that the allegations of petitioners' actual knowledge, acquiescence, and agreement are sufficient, drawing all inferences in favor of respondent. This amounts to error-correction, which is not a sufficient reason to grant certiorari, especially here where the Second Circuit's decision is painstakingly faithful to *Crawford-El* and *Swierkiewicz*. Furthermore, the courts of appeals decisions cited by petitioners ultimately are reconcilable with the Second Circuit's decision; indeed, no circuit court to discuss the decision below has expressed any disagreement with it. And finally, the "important protections" offered by the doctrine of qualified immunity are fully realized by the Second Circuit's decision.

a. Petitioners begin by mischaracterizing the decision below and the complaint in several ways: (1) by suggesting that the Second Circuit based its decision *solely* on the allegation that petitioners "knew about the unlawful conduct of their subordinates," Pet. 11; (2) by arguing that respondent alleged only that petitioners established a general policy of holding "high interest" detainees in restrictive conditions of confinement, but not that petitioners established a policy to discriminate on the basis of race, religion, and national origin, Pet. 12; and (3) by characterizing respondent's allegations as to petitioners' knowledge and intent to discriminate as "conclusory." Pet. 15. Even a cursory review of the complaint and the Second Circuit's ruling exposes the falsity of these assertions.

First, it is apparent from the Second Circuit's ruling that the court based its decision on more than petitioners' knowledge of unlawful discrimination by their subordinates. The court correctly noted that respondent alleged that he was kept in harsh conditions of confinement solely because of discrimination and that petitioners, among others, targeted respondent for mistreatment because of his race, religion and national origin. App. 59a. Additionally, the Second Circuit found that respondent specifically alleged that petitioners both condoned and agreed to this discrimination, and that no further subsidiary facts need be alleged. App. 62a. Petitioners' contention to the contrary cannot be reconciled with the plain language of the complaint:

- Petitioner Ashcroft was the "principal architect" of the policies challenged in this lawsuit. App. 157a (Compl. ¶ 10).

- Petitioner Mueller was "instrumental in the adoption, promulgation, and implementation" of the challenged policies. *Id.* (Compl. ¶ 11).
- The FBI, under the direction of petitioner Mueller, arrested and detained thousands of Arab Muslim men as part of its investigation into the events of September 11, 2001. *Id.* 164a (Compl. ¶ 47).
- Respondent was classified as "of high interest" to the September 11th investigation solely because of his race, religion, and national origin. *Id.* (Compl. ¶ 48).
- Petitioners approved a policy of holding "high interest" detainees in highly restrictive conditions of confinement until "cleared" by the FBI. *Id.* 168a (Compl. ¶ 69).
- Petitioners knew, condoned, and agreed to subject respondent to harsher conditions of confinement because of his race, religion, and national origin. *Id.* 172a (Compl. ¶ 96).
- Petitioners willfully designed a policy of confining individuals like respondent in the ADMAX SHU for arbitrary reasons. *Id.* 173a (Compl. ¶ 97).
- Petitioners adopted and promulgated a policy and practice of imposing harsher conditions of confinement on respondent because of respondent's religious beliefs, *id.* 201a, 106a (Compl. ¶¶ 232, 247), race, *id.* 202a, 208a

(Compl. ¶¶ 235, 250), and national origin, *id.* 208a (Compl. ¶ 250).

- Petitioners targeted respondent for mistreatment because of respondent's race, religion, and national origin. *Id.* 191a (Compl. ¶ 198).

The cited language conclusively shows that respondent alleged that petitioners were personally responsible for the discriminatory policy of classifying Arab and Muslim detainees as "high interest" solely because of their race, religion, and national origin – the complaint alleges that "high interest" detainees were classified as such for discriminatory reasons, that they were confined in the ADMAX SHU, and that petitioners approved of respondent being confined in the ADMAX SHU because of his race, religion, and national origin. But if any further confirmation were needed, one need look no further than the arguments petitioners themselves made below. In their appellate brief, petitioners acknowledged the complaint's allegation that petitioners "adopted and implemented a 'policy and practice of imposing harsher conditions of confinement' on plaintiffs because of their religious beliefs or race," and adopted the "hold-until-cleared" policy because of discriminatory animus. (Opening Appellate Br. for Petitioners at 47-48). Petitioners then argued that these allegations should be rejected, not because the complaint only alleged petitioners' *knowledge* of misconduct (as petitioners argue for the first time here), but for two different reasons: (1) one should expect that those suspected of involvement in September 11 would share the "religious and national origin background"

of the attackers; and (2) that the allegations as to discriminatory animus were "patently absurd." *Id.*[6]

Thus, we are left with petitioners' argument that respondent's claim "that petitioners 'knew of, condoned, and willfully and maliciously agreed' to subject him to unlawful discrimination" is a "legal conclusion" that the Court is not bound to accept as true at the motion to dismiss stage. Pet. 15. The difficulty with this argument is that the complaint does not use the term "unlawful discrimination" – the only possible "legal conclusion" to which the petition could be referring (as Fed. R. Civ. P. 9(b) specifically allows states of mind to be averred generally).[7] In fact, the paragraph of the complaint referred to by petitioners alleges that petitioners agreed to subject respondent to particular conditions of confinement in the ADMAX SHU solely because of his religion, race and national origin and not for any legitimate reason. App. 172a (Compl. ¶ 96). The complaint further alleges that petitioners implemented a policy and practice of imposing harsher conditions of confinement on respondent because of respondent's religion and race. App. 201a-202a (Compl. ¶¶ 232, 235). These are facts under Rules 8 and 9(b) – not legal conclusions – that establish respondent's claim of unlawful discrimination. Petitioners cannot summarize these

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[6] Petitioners' first argument is a remarkable concession to unlawful discrimination. And their second argument requires the assumption that individuals in high positions of authority are somehow immune from Anti-Arab and Muslim discrimination, an assumption that is inappropriate at this stage of the proceedings and belied by the facts alleged in the complaint.

[7] Indeed, the word "discrimination" is used once in the complaint's preliminary statement, and then only to describe particular causes of action. App. 154a (Compl. ¶ 1).

facts, attach a legal conclusion to them, and then accuse respondent of alleging only "legal conclusion[s]."

b. Shorn of its mischaracterization of the complaint, the petition simply argues that certain of respondent's allegations are legal conclusions that mandate the pleading of subsidiary facts. This seeks nothing but error correction, which is not an appropriate basis for certiorari. And petitioners' invocation of this Court's decisions in *Crawford-El* and *Swierkiewicz* does not alter this conclusion. To the contrary, to the extent those decisions suggest anything about what must be contained in a plaintiff's discrimination complaint, the Second Circuit's decision is loyal to them.

Crawford-El does not even address relevant pleading standards, or the relationship between pleading standards and qualified immunity. Rather, the Court considered and forcefully rejected a judicially-created heightened *burden of proof* that had been imposed on civil rights plaintiffs in which the motive of the defendant was an element of the cause of action. 523 U.S. at 592-594. To the extent that a defendant believes that there is insufficient factual pleading in a complaint, the *Crawford-El* Court stated in *dicta*:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The dis-

> trict judge has two primary options prior to permitting any discovery at all. First, the court may . . . grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.

Id. at 597-598 (internal quotation marks omitted).

Here, petitioners neither answered the complaint nor moved for a more definite statement. Petitioners thus effectively foreclosed the possibility of the court invoking the corrective mechanisms articulated in *Crawford-El*.

Petitioners' reliance on *Swierkiewicz* is also misguided. *Swierkiewicz* is significant for what it says about sufficiency of pleadings as a general matter and in cases such as this that involve allegations of discriminatory motive. As for pleadings in general, *Swierkiewicz* confirmed the minimal nature of notice pleading, by approving a complaint in a negligence case that alleged only that a defendant "negligently" hit a plaintiff with a motor vehicle on a particular street at a particular time. *Swierkiewicz*, 534 U.S. at 513 n.4. As for pleadings in discrimination cases, *Swierkiewicz* held that it is sufficient to allege that a plaintiff suffered an adverse employment consequence (the "what"), the events leading to that adverse consequence (the "when"), the identities and

protected-class status of some of the individuals involved (the "who"), and that the defendant took the adverse employment action "on account of" a plaintiff's protected class status. 534 U.S. at 514. The Court found these allegations sufficient, even though it acknowledged that its holding could result in complaints with "conclusory" allegations advancing to discovery. *Id.*

With this understanding of *Swierkiewicz* in mind, the complaint in the instant case easily alleges the what, when, who, and where elements: (1) the "what" is the use of harsh conditions of confinement on detainees solely because of their protected class status; (2) the "when" is the period that respondent was subjected to discriminatory classification and treatment; (3) the "who" are each of those individuals involved in different ways in respondent's confinement in the ADMAX SHU; (4) and the "where" is both Washington, D.C. and New York City. As such, the complaint states the "conduct, time, place, and persons responsible." *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005).

Petitioners would fault respondent for not having access at the time of filing to additional information establishing petitioners' liability, but the motion to dismiss standard does not require such particularity. *Bell Atlantic*, 127 S. Ct. at 1964 (not requiring "detailed factual allegations"). Insisting on such specificity here is particularly disingenuous, because petitioners and their codefendants found the complaint specific enough to lay blame for the conduct alleged therein at the feet of other defendants.[8] Moreover,

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[8] Petitioner Ashcroft's various arguments regarding his responsibility as compared to other defendants in this lawsuit demonstrate added difficulty with petitioners' argument. He

petitioners have far more control over respondent's access to information than do most defendants. Indeed, as recently as April 28, it was revealed for the first time that petitioner Ashcroft authored a memorandum to subordinates such as Michael Rolince, also a defendant in the instant case, outlining how the classification system at issue in this litigation was to be carried out. (*See* Tr. Of 4/28/08 Status Conference at 19, Docket No. 539). Without the discovery process, respondent would have no ability to lawfully obtain this document. It is presumably for this reason that this Court recognized in *Crawford-El* the well-established principle that discovery is the proper means for plaintiffs to amplify allegations in a complaint. 523 U.S. at 599-600. The teachings of *Swierkiewicz* and *Crawford-El* therefore confirm rather than conflict with the Second Circuit's decision.

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argued in the district court that lower level MDC officials were not responsible for the placement of respondent in restrictive conditions of confinement because that decision "was driven by national security and foreign threat concerns which wardens and prison officials were in no position to second guess." (Ashcroft District Ct. Br. at. 13 (*cited* at App. 118a)). Petitioner Ashcroft would apparently now argue that, not only were such decisions not made at the lowest levels of the MDC, nor were they made at the highest levels of the Department of Justice, placing responsibility squarely on his codefendants Rolince and Maxwell. Pet. 12-13. At the same time, petitioners' codefendants have suggested that petitioners bear ultimate responsibility for the discriminatory policies challenged here. (*See* Tr. Of 4/28/08 Status Conference at 19, Docket No. 539; Hasty Appellate Br. 43-44). In this situation, respondent cannot be expected to discern, prior to discovery, the precise roles and responsibilities exercised by each defendant when they themselves have important disagreements.

c. Nor is there any conflict between the circuit court cases cited by petitioners and the Second Circuit's decision. Pet. 18-21. Petitioners do not rest their argument on a split in the legal standard used by each of the circuits. Nor could they, because all but one of the decisions they cite were announced prior to *Bell Atlantic*. The substance of petitioners' claim is simply that different circuits have reached different results when reviewing arguments for dismissing different complaints. In the absence of any argument that courts of appeals are applying different standards, this is hardly evidence of a circuit split calling for the Court's intervention especially considering the critical factual differences between each of the cases identified by petitioners and the instant case.

In *Marrero-Gutierrez v. Molina*, 491 F.3d 1 (1st Cir. 2007), the only post-*Bell-Atlantic* case cited in the petition, the complaint was "limited to stating that [plaintiff] was badly treated at work and that her political party was mocked"; it failed to specifically allege that the defendants took adverse action against her because of her political affiliations. *Id.* at 9-10. In the absence of such an allegation, the Court found it "speculative" to believe that she had stated a claim. *Id.* Here, by contrast, respondent has alleged both an injury and that petitioners caused that injury because of their discriminatory animus. *Supra* 11-12. Thus, there is no conflict between the First Circuit's approach and that of the Second Circuit.[9]

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[9] The First Circuit has yet to discuss *Iqbal*, but lower courts in the First Circuit indicate agreement with the Second Circuit's interpretation of *Bell Atlantic*. *See Nickerson-Malpher v. Baldacci*, No. 07 Civ. 136, 2008 WL 696806 (D. Me. March 07, 2008); *Sanchez-Laureano v. Puerto Rico*, No. 07 Civ. 1172, 2008

The remaining decisions identified by petitioners predate *Bell Atlantic*, and therefore are of limited utility in establishing that the Second Circuit's interpretation of this Court's 2007 decision is in conflict with that of other circuits. They also are distinguishable on their facts. The Third Circuit's decision in *Evancho*, for instance, affirmed the dismissal of a complaint alleging an unlawful employment transfer because it did not state the "conduct, time, place, and persons responsible." 423 F.3d at 353. It did not even allege any action or knowledge by the defendant. *Id.* Unlike the complaint in *Evancho*, the allegations against petitioners are not just based on their position as heads of their department. *Id.* at 354. Significantly, the Third Circuit, in *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008), adverted to *Iqbal* without expressing any disagreement with its analysis.

Nor does the Sixth Circuit support the distinction suggested by petitioners. The Sixth Circuit has firmly rejected any heightened pleading standard, let alone a special pleading standard for "high level" officials. *Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002). Therefore, petitioners' citation to *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989), which petitioners acknowledge applied an abandoned heightened pleading standard, is of no moment. And yet again, petitioners ignore Sixth Circuit authority which has cited to *Iqbal* with approval. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 540-542 (6th Cir. 2007) (noting that almost all district courts in the circuit had agreed with *Iqbal*'s

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WL 542962 (D.P.R. February 25, 2008); *Brown v. Sweeney*, 526 F.Supp.2d 126 (D. Mass. 2007).

"close[] analy[sis]" of *Bell Atlantic*).

Finally, the Eleventh Circuit's decision in *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003), is a pre-*Bell Atlantic* decision that applied a heightened pleading standard that petitioners themselves, when arguing before the Second Circuit, expressly disclaimed. (Petrs.' Reply Br. at 4).[10] Moreover, the *Gonzalez* Court found the complaint in that case insufficient because the plaintiffs did not allege facts which established a causal connection between the defendants' instruction to effectuate an arrest warrant and the unconstitutional way in which the warrant was carried out. 325 F.3d at 1235. Here, by contrast, respondent has alleged that petitioners knew, approved, and agreed to have subordinates behave in an unconstitutional manner, not just that they directed subordinates to apply a race- and religion-neutral policy.

d. Petitioners finally claim that the Second Circuit's decision eviscerates the protections of qualified immunity, arguing that the qualified immunity doctrine affords immunity from suit itself, and therefore *any* discovery undermines qualified immunity. But

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[10] *Gonzalez* was briefed and argued prior to this Court's decision in *Swierkiewicz*. Since *Gonzalez* was decided, the Eleventh Circuit has neither cited nor discussed *Swierkiewicz* or *Erickson* in cases in which a "heightened pleading" standard was applied. *Epps v. Watson*, 492 F.3d 1240 (11th Cir. 2007); *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004); *Osburn v. Cox*, 369 F.3d 1283 (11th Cir. 2004); *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246 (11th Cir. 2003); *Dalrymple v. Reno*, 334 F.3d 991 (11th Cir. 2003); *Cottone v. Jenne*, 326 F.3d 1352, 1362 n.7 (11th Cir. 2003). Until the Eleventh Circuit addresses these decisions, its heightened pleading standard, as applied in *Gonzalez*, is an insufficient basis for finding a split here.

petitioners cannot mean to suggest that the blanket assertion of qualified immunity affords them immunity from discovery in every instance. When a qualified immunity defense cannot be resolved at the motion to dismiss stage, a district court has no choice but to permit discovery. *Crawford-El*, 523 U.S. at 593 n.14.

This Court's decisions recognize this critical fact. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), never suggested, as petitioners maintain, that *any* discovery at all undermines the qualified immunity defense. Instead *Harlow* focused on the harm of allowing "broad-ranging" discovery against government officials based solely on bare allegations of malice. 457 U.S. at 817-818. For this reason, *Harlow* abandoned the good-faith immunity standard of *Wood v. Strickland*, 420 U.S. 308 (1975), in favor of the objective reasonableness standard of qualified immunity that governs this case. *Harlow*, 457 U.S. at 818-819. Thus, this Court concluded that the proper way to protect officials from broad-ranging discovery was not to adjust the pleading standard, but to permit a defense based on the objective reasonableness of the defendant's conduct in light of clearly established law. The decision below is wholly consistent with this choice. The Second Circuit fully addressed petitioners' argument regarding objective reasonableness and clearly established law, and petitioners do not ask this Court to review the Second Circuit's resolution of those questions.

Crawford-El reaffirmed the distinction in *Harlow* between broad-ranging discovery and more limited discovery, recognizing that in certain circumstances, discovery necessary to resolve the issues of qualified immunity would be appropriate and would not viti-

ate the qualified immunity defense. *Crawford-El*, 593 n.14 ("Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from all discovery.").

Nor does the possibility that some individuals may use a lawsuit to "distract the attention of high-ranking officials in carrying out policies with which they disagree" justify petitioners' arguments here. Pet. 22. That risk is always present, regardless of the standards used to review pleadings. And this Court has given government officials a powerful tool in the face of such complaints: the argument that their conduct was objectively reasonable or that they did not violate clearly established law, and the opportunity to pursue that argument on interlocutory appeal. Government officials also may move for a more definite statement under Rule 12(e) if they desire amplified factual pleadings. It is only after a court has concluded that a plaintiff has stated a claim for constitutional violations, that the defendant's conduct as alleged was not objectively reasonable, and that the defendant's alleged conduct violated clearly established law that discovery be allowed to proceed. *Crawford-El*, 523 U.S. at 591 (there is nothing unfair about "holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the plaintiff"). Petitioners' implication that they were "effectively precluded" from raising their qualified immunity defense because of the complaint's alleged lack of detail is disingenuous when petitioners forcefully raised below both issues of objective reasonableness and lack of clearly established law, only to have them properly rejected. Pet. 22, App. 59a-60a.

Invoking the specter that litigants might use the legal system to file vexatious lawsuit ultimately proves too much, especially here where the Second Circuit clearly cabined the district court's discretion to control discovery.[11] App. 172a-173a. The Second Circuit carefully limited its "plausibility" holding to the September 11 context, in which one would expect individuals like Ashcroft and Mueller to be aware and involved in developing the detention policies, so that there was no fear that its opinion would mean that "every prisoner complaining of a denial of rights while in federal custody anywhere in the United States can survive a motion to dismiss simply by alleging that the Attorney General knew of or condoned the alleged violation." App. 43a.

e. Finally, it is germane to consider what relevance petitioners' status as "high-level" officials has when considering the sufficiency of allegations in respondent's complaint. Petitioners invoke the label throughout their petition like a talisman, perhaps hoping that it will result in an application of a heightened pleading standard without actually requesting that such a standard be applied. There are good reasons, however, that petitioners do not explicitly ask for a heightened pleading standard. As established above, *supra* 8-10, this Court has never approved a heightened pleading standard in the absence of authority from legislation or the Federal Rules. Petitioners explicitly disclaimed any reliance on a heightened pleading standard in the courts be-

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[11] Petitioners' and *amici curiae*'s reliance on Justice Stevens' concurrence in the judgment in *Mitchell* is passing strange, because Justice Stevens believed, contrary to the majority, that the Attorney General should have received absolute immunity. 472 U.S. at 542.

low, effectively conceding that there is no basis for applying such a standard here. (Petrs.' Reply Br. at 4). Petitioners do not identify any circuit court of appeals that has distinguished between "high-level" officials and other government employees for the purposes of pleading standards. And keying a pleading standard to the invocation of an affirmative defense like qualified immunity is nonsensical, because it requires plaintiffs to anticipate the invocation of an affirmative defense. *Jones v. Bock*, 127 S. Ct. 910, 921 (2007); *Crawford-El*, 523 U.S. at 595; *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). For all these reasons, petitioners should not be permitted to rely on their "high-level" status to erect additional pleading barriers prior to discovery.

Nor can petitioners' invocation of their status within the Government's hierarchy support a claim that somehow their claim to immunity should be considered differently from any other officer's. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). As the *Mitchell* Court held, despite his Cabinet-level status, the Attorney General is entitled to the same qualified immunity as any other government official, even when he claims that his allegedly unconstitutional actions were taken to protect national security. *Id.* at 520-524. As this Court firmly declared, "the security of the Republic" will not be threatened if petitioners "on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States." *Id.* at 524 . There is thus no support for petitioners' implication that either the pleading standard or the qualified immunity standard is affected by their status as "high-level" officials.

In short, the Second Circuit's decision properly took account of each of this Court's most relevant decisions – *Crawford-El*, *Swierkiewicz*, *Bell Atlantic*, and *Erickson* – by giving them all force. The Second Circuit paid close attention to *Crawford-El*'s admonition that district courts use controls on discovery to mediate the space between Rule 8 pleading standards and the protections necessary for qualified immunity. App. 172a-173a. The decision below recognized that *Swierkiewicz* established the baseline for minimal pleading standards that are met in the instant case, while applying the "plausibility" standard articulated in *Bell Atlantic*. App. 19a-27a.[12] And the Second Circuit recognized that *Erickson* confirmed that *Bell Atlantic* did not mark a substantial departure from this Court's well-established pleading jurisprudence. App. 23a-24a. For these reasons, certiorari is not appropriate to address the first question presented by petitioners.

II. No Grounds Exist To Grant Certiorari On The Question Of Whether "High-Ranking" Officials May Be Held Liable Based On A Constructive Notice Theory

Petitioners also argue that certiorari is appropriate to consider whether "high-ranking" officials can be held liable under *Bivens* on a constructive notice theory. There are several reasons why the Court should not consider this question.

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[12] Unlike the complaint in *Bell Atlantic*, there is no plausible reading of the allegations in respondent's complaint that could establish the lawfulness of petitioner's conduct, given the factual allegations contained therein.

a. The first barrier is a substantial one: as petitioners concede, they did not raise below the issue of actual versus constructive knowledge. Pet. 4 n.6. Petitioners claim that addressing the issue would have been futile "[i]n light of established circuit precedent," but they cite no authority for the proposition that their waiver can be excused for this reason. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (argument is waived if not raised below). This in itself is a sufficient reason for the Court to deny certiorari.

Moreover, the Second Circuit did not base its decision on the "constructive knowledge" theory. The Second Circuit found, in permitting respondent's equal protection claim to proceed, that petitioners actually knew and approved of the unconstitutional conduct of their subordinates as a matter of policy. App. 62a. Petitioners' quote from Judge Cabranes' concurrence itself reflects concern that petitioners will have to answer questions regarding their "possible knowledge" of subordinates' conduct, clearly referring to their subjective, actual knowledge, not to constructive knowledge. Pet. 32 (*quoting* App. 69a).

Petitioners fail to identify any part of the Second Circuit's opinion that rests on constructive notice. The Second Circuit's opinion does not even contain the words "constructive knowledge" or "constructive notice." Petitioners cite to only two portions of the Second Circuit's opinion in support of their assertion that the court below relied on a constructive notice theory of supervisory liability. Pet. 26 & n.6 (*citing* App. 14a & 62a). The first reference, App. 14a, was the Second Circuit's cursory recitation of its standard for supervisory liability, which allows for personal involvement to be shown by five alternative means.

Petitioners refer only to the fourth theory identified by the Second Circuit, "gross negligence" in supervising subordinates, as resting on constructive knowledge. But the Second Circuit nowhere declares that it allowed claims against petitioners to go forward based on their grossly negligent supervision of subordinates. And the second portion of the opinion cited by petitioners, App. 62a, discusses the complaint's allegations about petitioners' involvement in the *policy* of discriminating against Arabs and Muslims, involvement which relates to a different theory of supervisory liability identified by the Second Circuit: "creat[ing] a policy or custom under which the violation occurred." App. 14a.

There is an obvious explanation for why petitioners did not raise the issue below, and why the Second Circuit had no need to rely on a constructive knowledge theory of liability: this case arises at the motion to dismiss stage, where respondent's allegation that petitioners had actual knowledge of their subordinates' unconstitutional conduct is accepted as true. Absent a theory of liability that would hold petitioners accountable for their constructive, but not their actual, knowledge, there was no reason for petitioners to raise, or for the Second Circuit to discuss, the issue of constructive knowledge. Thus, petitioners seek certiorari on a question that they did not raise below, that the Second Circuit did not pass on, and that is not even implicated by the complaint in the instant case.

b. Understanding the motion to dismiss posture in which this case arises clarifies the irrelevance of the circuit split alleged by petitioners. All of the circuit court decisions cited by petitioners in support of a split as to the second question presented were de-

cided at *summary judgment* or *after trial*, when the plaintiff cannot rest on the allegations in the complaint but must provide evidence to support either actual or constructive notice. *See Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1, 10-11 (1st Cir. 2007) (reviewing dismissal of case after trial); *Carter v. Morris*, 164 F.3d 215, 220-221 (4th Cir. 1999) (reviewing record on summary judgment); *Hall v. Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993) (same); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 (3d Cir. 1995) (same); *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992) (same).[13] And although petitioners imply that the D.C. Circuit is in conflict with the Second Circuit, in fact, then-Judge Roberts' opinion for the D.C. Circuit explained that a claim would be dismissed in the absence of an allegation that the supervisory defendants "had actual or constructive knowledge of past transgressions." *International Action Ctr. v. United States*, 365 F.3d 20, 28 (D.C. Cir. 2004). Thus, the only cases that petitioners rely on in which constructive knowledge of subordinate misconduct was deemed insufficient to establish supervisory liability were decided at the summary judgment stage, when a plaintiff's allegation of actual knowledge need not be taken as true.

Therefore, any split of authority on the issue suggested by petitioners is not implicated in this case,

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[13] The Seventh Circuit cases cited by petitioners do not address the issue presented by the petition. *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997) (holding that defendant cannot be held liable for simple negligence, a proposition with which the Second Circuit has no quarrel); *Kelly v. Municipal Courts*, 97 F.3d 902, 909 (7th Cir. 1996) (establishing general rule that defendant be personally involved in constitutional violation, including by acquiescing in subordinates' unconstitutional conduct).

because the issue of constructive knowledge simply has not yet arisen. More to the point, the circuit courts that petitioners claim are in conflict with the Second Circuit would undoubtedly agree with the judgment below, because respondent alleged that petitioners condoned and agreed to respondent being subjected to unconstitutional treatment. *Baker*, 50 F.3d at 1194 (requiring actual knowledge and acquiescence); *Woodward*, 977 F.2d at 1399 (same); *Gossmeyer*, 128 F.3d at 495 (requiring actual knowledge and approval of unconstitutional conduct of subordinates). Thus, there is no meaningful conflict between the Second Circuit's approach and that of its sister circuits with respect to the allegations in the complaint.

c. Finally, contrary to petitioners' contention, there is no tension between the Second Circuit's supervisory liability standard and this Court's decisions. Accepting *arguendo* that the Second Circuit has at least implied that constructive knowledge would be sufficient to establish supervisory liability in civil rights actions, this would not be inconsistent with *Rizzo v. Goode*, 423 U.S. 362 (1976). The theory of liability accepted by the lower court and rejected by this Court in *Rizzo* had nothing to do with constructive knowledge, but with the proposition that supervisory officials have an affirmative duty to eliminate misconduct of subordinate officials, a duty which is breached whenever some pattern of misconduct has occurred. *Id.* at 376. The district court's error in *Rizzo* was to enter judgment against defendants who had "played no affirmative part" in depriving anyone of any constitutional rights. *Id.* at 377. The Second Circuit also does not permit supervisory liability to be imposed absent some involvement in a

constitutional violation. *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002).

Similarly, petitioners' citation to the numerous admonitions from this Court that supervisory liability (in the Section 1983 or *Bivens* contexts) may not be based on a theory of *respondeat superior* is noncontroversial, and fully incorporated in the Second Circuit's jurisprudence. *Id.* The court below did not rest on a *respondeat superior* theory.

This leaves petitioners' reliance on *Farmer v. Brennan*, 511 U.S. 825 (1994), which described the standard for liability in the very specific context of a supervisory prison official's failure to protect a prisoner from harm inflicted by other prisoners. *Id.* at 829. As *Farmer* made explicit, it required a standard of actual knowledge because it was interpreting the Eighth Amendment, which requires the imposition of a punishment. 511 U.S. at 837-838. Indeed, *Farmer* recognized that the standard for municipal liability, which petitioners explicitly adopt here, uses the term "deliberate indifference" but allows for liability based on constructive notice. *Farmer*, 511 U.S. at 840-841 (explaining that constructive notice was appropriate in the Section 1983 municipal failure to train context but not in the prison context, even though the standard used in both settings is called "deliberate indifference"). Because petitioners' equal protection claims here do not arise under the Eighth Amendment, *Farmer*'s requirement of actual knowledge is inapposite.

Nonetheless, despite the different contexts, petitioners insist that the Eighth Amendment deliberate indifference standard should apply to this case involving violations of the Equal Protection Clause and First Amendment. The only rationale offered by pe-

titioners is their particular status as Attorney General and Director of the FBI. Pet. 28. However, this Court has never before suggested that the contours of *Bivens* liability will depend on the *status* of a particular defendant. The *Mitchell* Court did not purport to apply a different Fourth Amendment standard simply because the defendant was the Attorney General. 472 U.S. at 530-535. To tolerate such a distinction would undermine *Mitchell*'s basic principle that even defendants such as petitioners must conform their conduct to the same law that every other government official follows. *Id.* at 524.

Here, like any discrimination claim, liability will be established by showing discriminatory animus plus disparate treatment or effect. *Washington v. Davis*, 426 U.S. 229, 240-241 (1976). Applying this well established standard, respondent's complaint adequately alleges sufficient facts with respect to petitioners' conduct. *Supra 11-12.* In this light, petitioners' reference to the difference between actual and constructive knowledge is a non sequitur. Petitioners' knowledge, constructive or otherwise, of their subordinates' discriminatory conduct is irrelevant where respondent has alleged both that petitioners intended to discriminate, and in fact created a policy that accomplished that discriminatory purpose. For these reasons, the Court should deny certiorari as to petitioners' second question.

III. Even If The Question Presented Were Certworthy, This Case, In Its Current Posture, Is A Poor Vehicle

Even were the Court inclined to grant certiorari on the questions presented, this case is a poor vehicle

for addressing the issue. First, there is a substantial question as to whether there is even jurisdiction to consider the questions presented. Interlocutory appeals, although disfavored, are permitted in limited circumstances for appeals of the denial of a motion to dismiss or for summary judgment asserting the defense of qualified immunity, as an iteration of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Not every denial of qualified immunity is subject to interlocutory appeal, however. *Johnson v. Jones*, 515 U.S. 304, 314 (1995). The exception for interlocutory appeals of qualified immunity decisions permits appellate courts to decide abstract issues of law, "typically, the issue whether the federal right allegedly infringed was 'clearly established.'" *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). When bringing such an appeal, however, the defendant must accept the *plaintiff's* version of the facts as presented in the district court, for in those circumstances the appellate court can review the district court's determination of the "purely legal issue what law was 'clearly established,'" and need not consider the correctness of the plaintiff's version of the facts. *Johnson*, 515 U.S. at 313. Here, petitioners are not arguing that the law was not "clearly established," but have instead refused to accept as true the facts alleged in respondent's complaint.[14]

Relatedly, granting certiorari would be premature. Consistent with this Court's admonition in

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[14] *Amici curiae* attempt to argue that the standards for supervisory liability were not clearly established in 2001. Not only have petitioners not sought certiorari on that question, but petitioners also did not even raise that argument below.

Crawford-El, the Second Circuit remanded to the district court to permit limited discovery regarding the qualified immunity defense raised by petitioners, among others. App. 172a-173a. The purpose of so doing was to protect petitioners and their co-defendants from the "broad-reaching" discovery with which *Harlow* was concerned. *Crawford*-El, 523 U.S. at 593 n.14. Therefore, contrary to petitioners' suggestions, they have yet to be confronted with answering discovery that undermines the interests behind the qualified immunity defense. *Id.* The court of appeals envisioned a reasonable progression of discovery, from limited written discovery targeted to the qualified immunity issues before even depositions were permitted of petitioners.

Finally, even if the Court grants certiorari here and ultimately disagrees with the Second Circuit's assessment of the complaint, respondent will be able to amend his complaint to allege subsidiary facts that establish petitioners' more direct involvement in discriminatory treatment. The Second Circuit and district court adverted to the existence of such evidence outside of the pleadings, which petitioners attempt to minimize by arguing that those specific facts do not appear in the complaint and should therefore be disregarded. Pet. 14-15. Whatever the merits of that argument for the purposes of assessing the complaint as filed, the availability of those facts counsel against granting certiorari . Additionally, since the complaint was filed, respondent has obtained discovery from the United States and other defendants that confirms different aspects of the roles that petitioners played in the unconstitutional conditions of confinement experienced by respondent. And most recently defendant Rolince, who reported

directly to petitioner Mueller, has indicated that he intends to rely on a memorandum issued by petitioner Ashcroft to show that he was acting consistent with petitioner Ashcroft's direction. (*See* Tr. Of 4/28/08 Status Conference at 19, Docket No. 539). Thus, the existence of evidence, from many sources, to support an amendment that would cure any possible pleading defect in respondent's complaint illustrates the ultimate futility of petitioners' arguments here.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

ALEXANDER A. REINERT
Counsel of Record
JOAN M. MAGOOLAGHAN
ELIZABETH L. KOOB
KOOB & MAGOOLAGHAN
221 DeVoe Avenue
Yonkers, NY 10705
(914) 964-8888

DAVID J. BALL
RIMA J. OKEN
WEIL, GOTSHAL, & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8323

MAY 2008

REPLY BRIEF

No. 07-1015

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals held that the former Attorney General of the United States and the current Director of the FBI may be subjected to discovery and the demands of further litigation in this *Bivens* action, because the complaint "alleges broadly" (Pet. App. 62a) that they adopted, knew about, or condoned policies that led to the allegedly discriminatory actions of much-lower-level officials in the Department in responding to the unprecedented national-security crisis in the wake of the September 11, 2001 attacks. See Pet. 2-5, 12-15. As explained in the petition, that holding is at odds with this Court's qualified-immunity precedents and conflicts with the decisions of other circuits. That holding also threatens to compromise "the effectiveness of government as contemplated by our constitutional structure," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 820 n.35 (1982), at

times when—as in the aftermath of September 11, 2001—effective government is most vital.

In response, respondent identifies various "vehicle" concerns (Br. in Opp. 2, 10, 33), suggests that the solution to the conclusory allegations in the complaint is simply to allow discovery against the former Attorney General and Director of the FBI to proceed (*id.* at 10, 18-19 n.8, 19, 23), and repeatedly claims that this case involves "nothing but error correction" (*id.* at 16; see *id.* at 9, 11). But as explained below, there is no vehicle problem with this case. This Court has emphasized that qualified-immunity doctrine seeks to ensure that "'insubstantial claims' * * * [will] be resolved *prior to* discovery." *Anderson* v. *Creighton*, 483 U.S. 635, 640 n.2 (1987) (emphasis added) (quoting *Harlow*, 457 U.S. at 818). And the court of appeals itself stated that this case presents an "unsettled question" concerning the "pleading standard to overcome a qualified immunity defense" (Pet. App. 15a) arising in an area of "[c]onsiderable uncertainty" (*id.* at 19a) in this Court's case law, and a matter "essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation" (*id.* at 25a).

Indeed, in his separate opinion, Judge Cabranes observed that "little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes," Pet. App. 69a-70a, and urged this Court to "reconsider[]" its precedents in this area "at the earliest opportunity," *id.* at 68a. And the concerns expressed by Judge Cabranes are amplified by the amicus brief in

support of certiorari filed on behalf of the former Attorneys General and Directors of the FBI.

The petition should be granted.

I. There Is No Vehicle Problem

Respondent presents (Br. in Opp. 33-36) three reasons why he believes this case is a "poor vehicle" for certiorari. None is persuasive.

First, he suggests (Br. in Opp. 34) that appellate jurisdiction may be lacking. But this Court has made clear that an order denying qualified immunity—like the district court's order in this case—is "immediately appealable" "to the extent it turns on an 'issue of law.'" *Behrens* v. *Pelletier*, 516 U.S. 299, 311 (1996) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985)). At this stage, petitioners' argument is not that there is insufficient *evidence* to support respondent's allegations, or that his allegations will ultimately prove to be false.[1] Instead, petitioners' position is that respondent's conclusory allegations about their personal involvement in the decision to classify him as being "of high interest" to the government's September 11th investigation are *legally* insufficient to permit his *Bivens* claims to survive a motion to dismiss. There is no bar to considering that legal challenge to the sufficiency of respondent's claims.

Second, respondent suggests (Br. in Opp. 34-35) that a grant of certiorari would be "premature" at this stage, because he has not had an opportunity for the discovery

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[1] Respondent suggests (Br. in Opp. 3 n.2) that his claims must have substance because the United States entered into a settlement with respondent's co-plaintiff "[o]n behalf of all defendants." In fact, the United States settled only the co-plaintiff's claims *against the United States* under the Federal Tort Claims Act, creating no inference about the strength of respondent's *Bivens* claims against *petitioners*.

that would ensue under the court of appeals' decision. This Court, however, has specifically recognized that one of the purposes of the qualified-immunity doctrine is to ward off insubstantial claims *before* discovery. *Anderson*, 483 U.S. at 640 n.2. And here, the court of appeals itself recognized that allowing respondent's claims to proceed "might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent." Pet. App. 25a; see also *id.* at 69a-70a (Cabranes, J., concurring) (discussing threat of "vexatious discovery").

Likewise, this Court has held that the "possibility of presenting an immunity defense on summary judgment" does not preclude an "appeal at the motion-to-dismiss stage." *Behrens*, 516 U.S. at 307. If petitioners are entitled to prevail at the current stage of the litigation, further review cannot be rendered "premature" simply because they might otherwise prevail before trial—after subjecting petitioners to discovery. That would contradict this Court's repeated articulations of "the importance of resolving qualified immunity questions at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (citing cases), because qualified immunity is an "immunity from suit," *Mitchell*, 472 U.S. at 526 (emphasis omitted).

Third, respondent asserts (Br. in Opp. 35-36) that, since filing the complaint, he has acquired sufficient "evidence, from many sources, to * * * cure any possible pleading defect in [his] complaint."[2] But respondent

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[2] By way of new "evidence," respondent mentions (Br. in Opp. 36) a recent status conference in which counsel for defendant Michael Rolince predicted that further discovery would disclose a memorandum from petitioner Ashcroft, which respondent characterizes (*id.* at 19) as "outlining how the classification system at issue in this litigation was to

has not sought to amend his complaint (and at this point does not have a right to amend it, see Fed. R. Civ. Proc. 15(a)(2)), and the possibility that he may seek to amend his complaint in the future provides no basis for denying review of the decision below, which erroneously holds that the extant complaint is not subject to dismissal under the qualified-immunity doctrine.

II. This Court Should Resolve When Pleading Allegations Are Sufficient To Vitiate High-Ranking Officials' Qualified Immunity From Suit In *Bivens* Actions

When it comes to the questions presented, respondent provides no persuasive reason to deny review. Rather, the bulk of his response focuses on his view of the merits and defense of the decision below.

a. As explained in the petition (at 11-18), the court of appeals' decision allowing the complaint to proceed past the dismissal stage conflicts with this Court's pre-

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be carried out." Rolince's counsel said she "ha[d] not seen that document" and did not "know what's in the document," but described it as "a memorandum, apparently from the [A]ttorney [G]eneral of the United States to, among other people, our clients, describing the procedure to be followed, which was apparently followed." 4/28/08 Tr. 20 (E.D.N.Y.) (No. 04-1809). Petitioners are not aware of any document meeting respondent's speculative description. Petitioners are, however, aware of a memorandum from the Attorney General about the September 11th investigation that went to Rolince and others, but that document has been available on the Internet for years, and did not address the classification system at all. Instead, it gave instructions for interviewing certain persons in the country on non-immigrant visas who were not "suspected of any criminal activity" and were to be treated "as potential witnesses" because they "might have knowledge of foreign-based terrorists." Memorandum from the Attorney General to All United States Attorneys and All Members of the Anti-Terrorism Task Forces, *Interviews Regarding International Terrorism* 2 (Nov. 9, 2001) <http://www.usdoj.gov/ag/readingroom/terrorism1.htm>.

cedents governing both the pleading standards for reviewing a motion to dismiss and the standards governing a motion to dismiss on the ground of qualified immunity. For example, this Court has explained that, to "protect[] the substance of the qualified immunity defense," district courts must require plaintiffs to "'put forward specific, nonconclusory factual allegations' * * * in order to survive a prediscovery motion for dismissal or summary judgment." *Crawford-El* v. *Britton*, 523 U.S. 574, 597-598 (1998) (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). The Court's subsequent decisions similarly stress that, to survive a motion to dismiss, a complaint must contain "more than labels and [legal] conclusions." *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007). The conclusory and bare-bones allegations against petitioners fail to cross that important threshold.

In defending the court of appeals' decision, respondent attempts (Br. in Opp. 12-16) to demonstrate that his allegations of petitioners' personal involvement are not "conclusory" by quoting several places in the complaint where he generally alleges—without any specific supporting allegations—that petitioners were personally involved in decisions affecting how he was treated. Thus, he calls petitioner Ashcroft the "principal architect" of unwritten policies and says petitioner Mueller was "instrumental" in the "adoption, promulgation, and implementation" of those unwritten policies. *Id.* at 12-13 (quoting Pet. App. 157a (Compl. ¶¶ 10-11)). He further claims that all of the defendants (including petitioners) "knew of, condoned, and willfully and maliciously agreed" to treat him harshly because of his race and religion, and that all of the defendants "targeted [him] for mistreatment." *Id.* at 13-14 (citing Pet. App. 172a,

191a (Compl. ¶¶ 96, 198)). But repetition and rephrasing do not make respondent's bare-bones allegation of petitioners' personal involvement any less conclusory. And without the requisite subsidiary factual allegations, respondent has not met his "obligation to provide the 'grounds' of his 'entitle[ment] to relief.'" *Bell Atl. Corp.*, 127 S. Ct. at 1964-1965.

Moreover, while respondent unabashedly defends the result reached by the Second Circuit, that court candidly acknowledged that it struggled in applying this Court's precedents and expressed concern over the result—allowing this case to proceed against petitioners—that it ultimately believed this Court's decisions compelled. See Pet. App. 15a, 25a; *id.* at 69a-70a (Cabranes, J., concurring). At a minimum, review is warranted to clarify the "[c]onsiderable uncertainty" (Pet. App. 19a) that the Second Circuit perceived in this Court's case law.

b. In attempting to deny the existence of a circuit conflict, respondent claims that decisions "announced prior to *Bell Atlantic*" cannot be used to establish any conflict. Br. in Opp. 20. But regardless of how one assesses the impact of *Bell Atlantic*, the Court's decision surely did not *lessen* the burden that a plaintiff bears in pleading a valid claim. Thus, where courts of appeals found allegations to be *inadequate* in pre-*Bell Atlantic* decisions, those same allegations would, *a fortiori*, be equally inadequate after *Bell Atlantic*. Similarly, the fact that other courts agree with the Second Circuit that *Bell Atlantic* applies outside the context of antitrust conspiracy allegations, *id.* at 21-22 (citing *Weisbarth* v. *Geauga Park Dist.*, 499 F.3d 538, 540-542 (6th Cir. 2007)), or that the Eleventh Circuit may continue to apply a heightened pleading standard, *id.* at 22 & n.10, does not diminish the conflict on the first question.

Furthermore, respondent's specific attempts to distinguish the conflicting decisions described in the petition are simply mistaken. For example, he claims that the complaint in *Marrero-Gutierrez* v. *Molina*, 491 F.3d 1 (1st Cir. 2007), is distinguishable because it "failed to specifically allege that the defendants took adverse action against [the plaintiff] because of her political affiliations." Br. in Opp. 20. But the complaint *did* allege that the plaintiff's supervisors had "performed, fostered, and encouraged the continuous persecution, harassment, transfers, reprisals and demotions" of the plaintiff "*because of*" her political affiliation. *Gutiérrez* v. *Molina*, 447 F. Supp. 2d 168, 175 (D.P.R. 2006) (emphasis added), aff'd, 491 F.3d 1 (1st Cir. 2007). Yet because the complaint lacked specific, supporting allegations making that conclusion something other than speculative, the First Circuit held that the complaint was deficient. *Marrero-Gutierrez*, 491 F.3d at 9-10. Thus, in conflict with the decision below, the First Circuit held that *Bell Atlantic* is not satisfied by a conclusory allegation that an injury resulted from the defendants' discriminatory animus.

Similarly, respondent claims that the allegations in *Evancho* v. *Fisher*, 423 F.3d 347 (3d Cir. 2005), were insufficient because they "did not even allege any action or knowledge by the defendant." Br. in Opp. 21. In fact, the complaint specifically alleged that the plaintiff's termination "was carried out by underlings reporting directly to the attorney general and/or *by the attorney general himself*." *Evancho*, 423 F.3d at 354 (emphasis added). That conclusory allegation was not held sufficient to overcome dismissal of the claim against the attorney general. *Ibid.* (refusing to credit "bald assertion" of attorney general's involvement).

c. Finally, respondent claims (Br. in Opp. 25-27) that petitioners' "status as 'high-level' officials" is irrelevant to pleading standards and qualified immunity. That claim ignores reality. Adherence to pleading standards and qualified-immunity doctrine is always important, but it is particularly critical in the case of high-ranking officials, who could face countless suits due to their supervisory responsibilities if all it takes to subject such an official to discovery or the demands of litigation is a conclusory allegation that he knew about, approved, or condoned actions taken by much-lower-level officials.

Under the decision below, high-level officials—up to and including Cabinet officers—can be subjected to discovery based solely on such conclusory allegations. In this context, the failure to "'put forward specific, non-conclusory factual allegations'" raises special concerns about "protect[ing] the substance of the qualified immunity defense," *Crawford-El*, 523 U.S. at 597-598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)), both because litigants may have political reasons for targeting high-level officials, and because the potential harm to government effectiveness arising from frivolous claims is correspondingly greater. See Pet. 21-24; Pet. App. 70a & n.1 (Cabranes, J., concurring). Those concerns are borne out by the former Attorneys General and FBI Directors who support petitioners here. See Barr Amicus Br. at 10-14.

For similar reasons, the fact that this case arises in "the September 11 context" (Br. in Opp. 25) cuts in favor of—and not against—giving effect to this Court's qualified-immunity precedents. Indeed, qualified-immunity principles should be most carefully followed when law-enforcement officers are responding to novel and extraordinary threats. The court of appeals, however,

reached the perverse conclusion that the Attorney General and FBI Director are *more* exposed to the burdens of litigation when they are overseeing such an unusually important law-enforcement investigation. The protections of qualified immunity should not wane at exactly those moments when high-level officials are faced with the most urgent and daunting national-security crises. Yet, as Judge Cabranes suggested, that is the upshot of the decision below.

III. This Court Should Address Whether High-Ranking Officials May Be Personally Liable Based On Constructive Notice Of Their Subordinates' Actions

As explained in the petition (at 25-33) this case presents a second, related question on which the circuits are also split, namely, whether government supervisors may be held personally liable under *Bivens* for wrongdoing of which they lacked actual knowledge on the theory that their official responsibilities gave them constructive notice of their subordinates' actions.

Respondent contends (Br. in Opp. 28) that this question has been waived because, in light of the extant Second Circuit precedent, petitioners did not brief the actual knowledge issue in the court of appeals. See Pet. 26 n.6. This Court, however, may review "an issue not pressed [in a federal court of appeals] so long as it has been passed upon," especially when the issue is "important" and the case is not one in which the petitioner "reversed its position" after "losing in the [c]ourt of [a]ppeals." *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992) (internal quotation marks omitted). Here, the court of appeals expressly acknowledged that respondent's claims rest in part on "generalized allegations of supervisory involvement," Pet. App. 25a, and specifically

invoked its permissive standards for supervisory liability in holding that respondent has adequately alleged petitioners' personal involvement, Pet. App. 62a (concluding that Ashcroft and Mueller may be held personally liable "for the actions of their subordinates under standards of supervisory liability outlined above"). For example, under the Second Circuit's supervisory-liability standard, a defendant with no knowledge of the actions of lower-level officials may be held personally liable if he is found "grossly negligent in supervising subordinates who committed the violation." Pet. App. 14a. Under the decision below, therefore, constructive notice is enough.

Rather than dispute the existence of a split or the importance of the question, respondent claims (Br. in Opp. 31) that "the issue of constructive knowledge has not yet arisen" in this case because he has *alleged* that petitioners had actual knowledge of discriminatory conduct. That argument is unpersuasive because, as discussed above, it depends entirely on the assumption that respondent's conclusory allegations are sufficient to establish for current purposes petitioners' personal involvement and knowledge. If those allegations are not sufficient to plead actual knowledge, then respondent is left only with a constructive-knowledge theory.

On the merits of the constructive-knowledge question, respondent suggests (Br. in Opp. 32) that the deliberate-indifference standard from *Farmer* v. *Brennan*, 511 U.S. 825 (1994), should be limited to the Eighth Amendment context. But particularly in light of this Court's traditional reluctance to expand the scope of personal liability under *Bivens*, see generally *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007), it would be appropriate to conclude that, unlike corporate municipalities, indi-

vidual federal officers may be held liable only on the basis of an objective standard of knowledge and their own culpable conduct. Pet. 26-28.

* * * * *

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MAY 2008

AMICUS CURIAE BRIEF

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(2)

No. 07-1015

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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigations,
Petitioners,

v.

JAVAID IQBAL, *et al.*,
Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Second Circuit

BRIEF OF WILLIAM P. BARR, EDWIN MEESE III, WILLIAM S. SESSIONS, RICHARD THORNBURGH, WILLIAM H. WEBSTER, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: March 7, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

1. Whether a conclusory allegation that a cabinet-level officer or high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are three former Attorneys General, two former Directors of the FBI, and a public interest law firm.[1] They believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. They are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of insubstantial constitutional claims.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Edwin Meese III served as

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondent Iqbal with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable William S. Sessions served as Director of the Federal Bureau of Investigations (FBI) from 1987 to 1993. He also served as a federal judge on the United States District Court for the Western District of Texas from 1974 to 1987, serving as Chief Judge of that court from 1980 to 1987; and was the United States Attorney for the Western District of Texas from 1971 to 1974. From 1969 to 1971, he was the Chief of the Government Operations Section of the Justice Department's Criminal Division.

The Honorable Richard Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Honorable William H. Webster served as Director of the FBI from 1978 to 1987. He also served as Director of the Central Intelligence Agency from 1987 to 1991. He served as a judge on the United States District Court for the Eastern District of Missouri from 1970 to 1973, and on the United States Court of Appeals for the Eighth Circuit from 1973 to 1978.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. It regularly appears in this and other federal courts to support the litigation immunity rights of public officials.

STATEMENT OF THE CASE

Respondent Javaid Iqbal is a citizen of Pakistan who has filed a civil action in United States courts, seeking to recover damages for alleged mistreatment while being held during 2002 at a federal detention facility in Brooklyn on federal criminal charges. Iqbal ultimately pleaded guilty to those charges and was removed to Pakistan following completion of his sentence. Among those he seeks to hold responsible for his alleged mistreatment are Petitioners John D. Ashcroft (the United States Attorney General at the time of Iqbal's detention) and Robert Mueller (who was then, and still is, Director of the Federal Bureau of Investigations). Iqbal does not allege that either Ashcroft or Mueller directed subordinates to take any specific actions with respect to Iqbal or that either was even aware of his case.

Iqbal alleges that he was arrested on federal charges on November 2, 2001 and was thereafter housed in the general population unit at the Metropolitan Detention Center in Brooklyn (MDC) until January 8, 2002. Pet. App. 169a, ¶¶ 80-81. From that date until the end of July 2002, Iqbal was housed in MDC's Admax special housing unit, a maximum-security unit created at MDC in the wake of the 9/11 terrorist attacks to house federal prisoners deemed "of high interest" in the post-9/11 terrorism investigation. *Id.* Iqbal was returned to MDC's general population in July 2002 after the FBI cleared him of involvement in terrorist activity. Iqbal pleaded guilty to criminal charges (defrauding the United States) in April 2002, was sentenced in September 2002, and was released from the MDC in January 2003.

Following completion of his sentence and his removal to Pakistan, Iqbal filed suit in May 2004 against a large number of federal officials, including Ashcroft and Mueller. The suit included statutory claims as well as constitutional claims pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Iqbal complains both about the conditions of his confinement and about the initial decision to move him to the Admax unit. He alleges that he was assigned to Admax even though there was no evidence that he had links to terrorists and solely because of his religion (Islam), race, and/or nationality.

Iqbal's claims alleging mistreatment while in Admax are directed primarily at defendants who were employed at MDC in 2002; these causes of action do not list Ashcroft and Mueller as defendants. Among the claims directed at those two defendants, three remain: (1) a *Bivens* claim that they violated his First Amendment rights by imposing harsher conditions of confinement because of his religion, Pet. App. 201a-202a; (2) a *Bivens* claim that they violated his Fifth Amendment rights to equal protection of the laws by imposing harsher conditions of confinement because of his race/nationality, *id.* 202a-203a; and (3) claims under 42 U.S.C. § 1985(3) that they conspired to deny him his civil rights because of his religion, race, and/or nationality. *Id.* 206a-209a.

The district court in large part denied the defendants' motions seeking dismissal on qualified immunity grounds. Pet. App. 71a-150a. The court held that it could not conclude that there was "no set of facts" on which Iqbal could recover from Ashcroft and Mueller under his *Bivens* and § 1985(3) conspiracy

claims. *Id.* 136a-137a, 146a.

The Second Circuit affirmed the denial of Ashcroft's and Mueller's immunity claims in relevant part. *Id.* 1a-70a.[2] The appeals court recognized that "[q]ualified immunity is an immunity from suit and not just a defense to liability," *id.* 13a, and that some of Iqbal's allegations "suggest that some of [his] claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement." *Id.* 25a. The court nonetheless concluded that Iqbal's allegations were sufficiently specific to withstand a motion to dismiss based on qualified immunity. *Id.* 58a-65a. The court based that conclusion on allegations in the amended complaint that Ashcroft and Mueller were instrumental in adopting the "policies and practices challenged here," and that, although others made the determination that Iqbal was of "high interest," they "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* 62a.[3] The court concluded that the amended complaint met the pleading standards

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[2] The court ordered dismissal of Iqbal's procedural due process claims, *id.* 29a-46a, and thus those claims are not part of the Petition. The court held that although the amended complaint adequately stated a claim for violation of Iqbal's procedural due process rights by Ashcroft and Mueller, *id.* 31a-43a, they were entitled to dismissal based on qualified immunity because those rights had not been clearly established in court decisions by 2002. *Id.* 43a-46a.

[3] The Second Circuit apparently was quoting from ¶¶ 10-11 and from ¶ 96 of the amended complaint, Pet. App. 157a, 172a-173a.

of Fed.R.Civ.P. 8(a) (described by the court as a "plausibility standard"), even without any "allegation of subsidiary facts," in light of:

> [T]he likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.

Id.

The appeals court also held that Ashcroft and Mueller could bear "personal responsibility for the actions of their subordinates under the standards of supervisory liability outlined" in Second Circuit case law. *Id.* Under those standards, federal supervisors can be held liable for the constitutional torts of their underlings, even if they were unaware of the conduct, if they were "grossly negligent in supervising subordinates who committed the violation." *Id.* 14a. The court supported that legal conclusion by citing Second Circuit precedent that established supervisory liability of state and local officials under 42 U.S.C. § 1983. *Id.*

Judge Cabranes wrote a separate concurring opinion. *Id.* 67a-70a. He stated that some of the relevant Supreme Court and Second Circuit precedents were "less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity." *Id.* 68a. While agreeing that existing precedents pointed toward the result reached by the appeals court, he warned:

> [L]ittle would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

Id. 69a-70a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Qualified immunity not only provides government officials with a defense to liability; it also is "an entitlement not to stand trial or face *the other burdens of litigation.*" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet, the decision below calls into question the ability of high-level Executive Branch officials to win dismissal, on qualified immunity grounds, of even frivolous *Bivens* litigation filed by anyone claiming to be aggrieved by their official conduct. In the absence of dismissal, those officials face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities. As former senior Executive Branch officials, the individual *amici curiae* share Judge Cabranes's concerns regarding the disruptive effects of such discovery, and they are very concerned by the effects that such disruptions are likely to have on the ability of high-level officials to carry out their missions

effectively. Review is warranted to determine whether such disruptions are required under the terms of the Federal Rules of Civil Procedure, particularly when (as here) the challenged actions involve sensitive national security issues.

Review is also warranted to resolve the conflict that has developed among the federal appeals courts regarding the level of factual specificity required in a complaint by Fed.R.Civ.P. 8(a) in order to "set[] forth a claim for relief" and thereby defeat a motion to dismiss based on a government official's claim to qualified immunity. The Second Circuit held that a complaint is sufficient to withstand a qualified immunity dismissal motion so long as allegations in the complaint – no matter how conclusory – render at least "plausible" a conclusion that the defendant violated the plaintiff's constitutional rights. That holding is not a fair reading of the Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which interpreted Rule 8(a)(2) as requiring a complaint to make a "'showing,' rather than a blanket assertion, of an entitlement to relief." 127 S. Ct. at 1965 n.2.

The Second Circuit held that Iqbal made a sufficient "showing" of the personal involvement of Ashcroft and Mueller in the alleged religious, race, and nationality discrimination by alleging in general terms that they "were instrumental in adopting the policies and practices challenged here" and "maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin." Pet. App. 62a. Yet, the appeals court conceded that Iqbal "acknowledges" that subordinate FBI officials – not Ashcroft and Mueller –

made the decision to classify Iqbal as a "high interest" detainee. *Id.* More importantly, wholly absent from the amended complaint are any factual allegations regarding what Ashcroft and Mueller did to be labeled "instrumental" in the adoption of the alleged policies and practices or to have "maliciously agreed" to Iqbal's placement in the Admax unit. In other words, there are no allegations that answer such basic questions as "when," "where," "how," and "with whom" Ashcroft and Mueller are supposed to have involved themselves in the decision to subject Iqbal and/or others to harsh prison conditions based solely on their religion, race, and/or nationality. Review is warranted to resolve the conflict between *Twombly* and the decision below.

Review is also warranted to resolve the conflict that has developed among the federal appellate courts regarding when a government official can be held liable for the acts of subordinates. The Second Circuit held that Iqbal could prevail on his *Bivens* claim by demonstrating that Ashcroft and Mueller were "grossly negligent" in supervising subordinate officials within the Justice Department and the FBI, regardless whether they had actual knowledge of any constitutional violations committed by those subordinates. Other circuits have rejected efforts to impose such derivative liability on high-level government officials.

Indeed, the conflict among the federal appeals courts regarding supervisory liability calls into question the entire basis for permitting Iqbal's suit to go forward on that theory. Qualified immunity is intended to protect government officials from personal liability for their official actions unless those actions violated a law that "was clearly established at the time [the] action[s]

occurred." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *Amici* submit that the existence of a circuit conflict on the supervisory liability issue means that there is not now – nor could there have been in 2002 – a "clearly established" standard on supervisory liability based on gross negligence, sufficient to defeat Ashcroft's and Mueller's qualified immunity claim. Moreover, even within the Second Circuit, there appears not to have been any "clearly established" standard regarding *Bivens* actions seeking to impose supervisory liability on federal officials – the decision below relied solely on Second Circuit precedent regarding supervisory liability of state and local government officials under 42 U.S.C. § 1983. Whether the federal courts should recognize an implied *Bivens* cause of action against federal officials for supervisory liability raises a host of policy questions not relevant in cases asserting supervisory liability under § 1983. Review is warranted on the second Question Presented not only to resolve the conflict among the federal appeals courts regarding supervisory liability of government officials, but also to resolve the conflict between the decision below and the decisions of this Court that mandate immunity for high-level federal government supervisory personnel when, as here, it has not previously been "clearly established" that the federal courts recognize an implied *Bivens* action for deficient supervision.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW THREATENS THE ABILITY OF FEDERAL OFFICIALS TO AVOID THE BURDENS OF LITIGATION IMPOSED BY INSUBSTANTIAL CLAIMS

The Court has long recognized that significant

burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Harlow, 457 U.S. at 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

The burdens can be particularly pronounced among officials working on national security matters, where the high level of public passion can result in increased levels of litigation. As Justice Stevens explained:

> The passions aroused by matters of national security and foreign policy and the high profile of Cabinet officers with functions in that area make them "easily identifiable [targets] for suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. [731,] 753 [(1982)]. Persons of wisdom and honor will hesitate to answer the President's call to

> serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against high officials in recent years only confirms the rationality of this anxiety. The availability of qualified immunity is hardly comforting when it took 13 years for the federal courts to determine that the plaintiff's claim in this case was without merit.

Mitchell, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment).

In an effort to reduce such costs, the Court has crafted a qualified immunity doctrine designed to provide government officials with not only a defense to liability but also an "immunity from suit." *Id.* at 526. The "driving force" behind creation of the doctrine was a desire to ensure that "'insubstantial claims [will] be resolved prior to discovery.'" *Anderson*, 483 U.S. at 640 n.2. *See also Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").[4]

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[4] Resolving a qualified immunity claim is a two-step inquiry. First, the court must determine whether the facts alleged

Notwithstanding those directives, the Second Circuit has denied Petitioners' motion to dismiss based on qualified immunity, and has permitted the case to go forward on the barest of allegations of wrongdoing. It has done so despite its frank admissions that "some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement," Pet. App. 25a, and that denying Petitioners' motion "might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity provision was intended to prevent." *Id.* Indeed, the appeals court has permitted discovery to go forward under those circumstances in a case raising national security issues of the highest importance: the Justice Department's investigation into terrorist activity following the most deadly terror attack in American history.

Amici respectfully submit that review is warranted in light of the substantial impediments to effective government imposed by the decision below. Numerous commentators have catalogued the massive societal costs of failing to maintain adequate limitations on the personal liability of government officials for damages allegedly flowing from their actions. *See, e.g.*, Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for*

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by the plaintiff demonstrate that a defendant violated a constitutional right. Assuming the violation is established, the court must then determine whether that right was clearly established at the time of the challenged action. *Saucier*, 533 U.S. at 200-01. A right is deemed "clearly established" if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

Damages, 1980 S. CT. REV. 281 (1980); H. Allen Black, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733 (1991). Yet, as Judge Cabranes cogently explained in his concurring opinion, Iqbal's complaint is a "blueprint" that "other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government" can use to ensure that their complaints survive a motion to dismiss and to engage high-level government officials in "prolonged and vexatious discovery processes." Pet. App. 69a-70a.

Qualified immunity doctrine is designed to ensure that such disruptions are rare exceptions. But as interpreted by the Second Circuit, the doctrine provides no such protection because it can easily be circumvented by general allegations that high-level government officials "knew of," "condoned" or "agreed to" a course of conduct allegedly carried out by lower-level employees. *Amici* recognize that public policies underlying the qualified immunity doctrine must be balanced against the need to provide citizens with a "realistic avenue for vindication of constitutional guarantees," *Harlow*, 457 U.S. at 814, and that requiring too much specificity from plaintiffs who have not yet had access to discovery could result in dismissal of meritorious claims. It is readily apparent, however, that the appeals court has struck a balance that provides government officials with few if any of the protections that the qualified immunity doctrine was designed to provide. Review is warranted in light of the significant strains on effective government operations imposed by the Second Circuit's standard.

II. THE DECISION BELOW IMPROPERLY PERMITS COMPLAINTS TO PROCEED TO DISCOVERY BASED ON MERE BLANKET ASSERTIONS OF WRONGDOING

Review is also warranted to resolve the conflict that has developed among the federal appeals courts regarding the level of factual specificity required in a complaint by Fed.R.Civ.P. 8(a) in order to "set[] forth a claim for relief" and thereby defeat a motion to dismiss based on a government official's claim to qualified immunity.

Petitioners have thoroughly explained how the decision below conflicts with the decisions of at least four other federal appeals courts regarding the necessary factual specificity. Pet. 18-21. *Amici* will not repeat that discussion here. *Amici* are writing separately to point out how the decision below also conflicts with the decisions of this Court.

Fed.R.Civ.P. 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." While that rule eliminated the requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added), the rule:

> [S]till requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on

> which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (*Rule 8(a)* "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Twombly, 127 S. Ct. at 1965 n.3.

Twombly held that Rule 8(a) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. *Id.* at 1965. It held that requiring plausibility "reflects the threshold requirement of *Rule 8(a)(2)* that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966. The Court explained that a test requiring plausibility is not so strict as to require "probability" but nonetheless requires more than that the allegations are merely possible or conceivable. *Id.* at 1966, 1974.[5]

The Second Circuit was able to find that Iqbal met *Twombly*'s "plausible grounds" standard only by stripping that standard of all its heft. The amended

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[5] *Twombly* held that antitrust plaintiffs failed to meet that plausibility standard when they alleged, without adequate factual support, that the defendants (providers of local telephone service) had unlawfully conspired not to compete with one another. The principal fact asserted by the plaintiffs to support their conspiracy allegation was that the defendants had engaged in parallel conduct – each had failed to initiate competition in its rivals' geographic service areas. The Court concluded that that factual assertion was insufficient to render "plausible" the conspiracy allegation, because "[w]ithout more, parallel conduct does not suggest conspiracy." *Id.* at 1966.

complaint includes *no* factual assertions to support its conclusory allegations that Ashcroft and Mueller "knew of," "condoned" and "agreed to" the allegedly discriminatory treatment of Iqbal. While conceding that the amended complaint includes no "allegation of subsidiary facts," the appeals court deemed the claims against Ashcroft and Mueller to be plausible because of the importance placed by the Justice Department on its post-9/11 investigation.[6] In other words, instead of providing Executive Branch officials greater deference when national security issues are at stake (as some have suggested is appropriate), the Second Circuit cited the fact that the case raises important national security issues as a reason to permit *increased* judicial scrutiny of the conduct of high-level officials. It concluded that Iqbal's complaint was "plausible" based on nothing more than a supposition that Ashcroft and Mueller *might* have had some involvement in the decision to place him into restrictive conditions of confinement.

The Second Circuit's understanding of what constitutes a "plausible" claim cannot be squared with *Twombly*. *Twombly* made clear that the mere possibility that the allegations of a complaint are true is not sufficient to meet the requirements of Rule 8(a). While it is theoretically possible that Ashcroft and Mueller, while in the midst of directing the most massive anti-

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[6] The court deemed the allegations of personal involvement "plausible" in light of "the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." Pet. App. 62a.

terrorist operation in American history, took the time to concern themselves with the precise criteria employed by underlings in determining which New York-area detainees should be deemed of "high interest" (and thus should be placed in MDC's Admax unit), Iqbal has included nothing in his complaint to suggest that that scenario is plausible.

The Second Circuit felt compelled to reach its decision based on two recent decisions of this Court: *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); and *Crawford-El v. Britton*, 523 U.S. 574 (1998). Neither decision is apposite. *Swiekiewicz* held that when a Title VII plaintiff alleges that he was discharged based on discriminatory animus, he meets the requirements of Rule 8(a) without having to assert specific facts to support the claim of discriminatory motive; it is enough that he clearly alleges the discriminatory act in question (in that case, discharge from employment). 534 U.S. at 515. *Crawford-El* held that when an inmate alleges that a prison official took adverse action against him in retaliation for the inmate's exercise of First Amendment rights, the inmate – in order to defeat a motion to dismiss based on qualified immunity – need not assert facts demonstrating that the defendant harbored retaliatory intent; it was enough that the prisoner identified the specific adverse action allegedly taken by the prison official. 523 U.S. at 592. The Second Circuit concluded that *Swierkiewicz* and *Crawford-El* required it to accept at face value Iqbal's allegation that Ashcroft and Mueller acted with discriminatory intent. Pet. App. 61a.

That conclusion misses the mark. The issue is not whether Ashcroft and Mueller harbored

discriminatory motives when they took action with respect to Iqbal. Rather, the issue is whether they took any actions *at all* with respect to Iqbal. Review is warranted because the Second Circuit's interpretation of Rule 8(a)'s pleading requirements conflicts with *Twombly*.

III. THE DECISION BELOW IMPROPERLY DENIES QUALIFIED IMMUNITY FROM *BIVENS* CLAIMS THAT ASSERT SUPERVISORY LIABILITY

Review is also warranted to resolve the conflict that has developed among the federal appellate courts regarding when a government official can be held liable for the acts of subordinates. The Second Circuit held that Iqbal could prevail on his *Bivens* claim by demonstrating that Ashcroft and Mueller were "grossly negligent" in supervising subordinate officials within the Justice Department and the FBI, regardless whether they had actual knowledge of any constitutional violations committed by those subordinates. Pet. App. 14a, 62a. That holding appears to have played a role in the appeals court's denial of the motion to dismiss. Other circuits have rejected efforts to impose such derivative liability on high-level government officials.

The Petition describes in detail the "clear and well-developed split among the circuits on the question whether a government official may be held personally liable based on constructive notice of actual wrongdoing or the risk of wrongdoing by subordinates." Pet. 29. Accordingly, *amici* will not repeat that description here. Instead, *amici* write separately to emphasize that the conflict among the federal appeals courts regarding

supervisory liability calls into question the entire basis for permitting Iqbal's suit to go forward on that theory.

Amici are unaware of any prior federal appellate decision – and the Second Circuit has pointed to none – in which a high-level Executive Branch official has been held to answer in a *Bivens* action asserting liability based on constructive notice of wrongdoing by his/her subordinates. The Court recently explained that litigants alleging violation of their constitutional rights by federal officials are not necessarily entitled to a *Bivens* cause of action. To the contrary, the Court explained:

> [A]ny freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.

Wilkie v. Robbins, 127 S. Ct. 2588, 2597 (2007).

The Court explained that the decision regarding whether to recognize a *Bivens* action for alleged violations of constitutional rights requires examination of two factors. First, a court must examine "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 2598. Second, "'the federal courts must make the kind of remedial determination that is appropriate for a common-law

tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

Amici submit that both of those factors counsel against recognition of a *Bivens* action against high-level Executive Branch officials based on alleged inadequate supervision of their subordinates, at least under the facts as alleged here.[7] But regardless how those two factors are resolved, the Second Circuit's holding is highly problematic. Qualified immunity is intended to protect government officials from personal liability for their official actions unless those actions violated a law that "was clearly established at the time [the] action[s]

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[7] *Amici* note that Iqbal, as a criminal defendant with access to counsel, had available to him numerous administrative and judicial avenues for challenging the conditions of his confinement during the six months he was held in MDC's Admax unit. *Amici* also submit that the extraordinary national security crisis facing the Justice Department in the relevant time period constitutes a "special factor[] counselling hesitation."

Moreover, recognizing a *Bivens* action based on supervisory liability under the circumstances of this case cuts against the central purpose of *Bivens* liability, which is to cause a federal official to hesitate if faced with a decision that jeopardizes a party's clearly established constitutional rights. That deterrence rationale is inapplicable to supervisory liability claims, in which the federal supervisor failed to detect and prevent wrongdoing by others. Under those circumstances, the threat of *Bivens* liability deters nothing, because there are no actions to deter. Imposing *Bivens* liability in such circumstances amounts to *respondeat superior* or vicarious liability, a basis for liability repeatedly rejected by federal courts. *See, e.g., International Action Center v. United States*, 365 F.3d 20, 27 (D.C. Cir. 2004) (Roberts, J.).

occurred." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *Amici* submit that the existence of a circuit conflict on the supervisory liability issue means that there is not now – nor could there have been in 2002 – a "clearly established" standard on supervisory liability based on gross negligence, sufficient to defeat Ashcroft's and Mueller's qualified immunity claim.

Indeed, even within the Second Circuit, there appears not to have been any "clearly established" standard regarding *Bivens* actions seeking to impose supervisory liability on federal officials – the decision below relied solely on Second Circuit precedent regarding supervisory liability of state and local government officials under 42 U.S.C. § 1983. *See, e.g.,* Pet. App. 14a (citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). Whether the federal courts should recognize an implied *Bivens* cause of action against federal officials for supervisory liability raises a host of policy questions – as set forth in *Wilkie* – not relevant in cases asserting supervisory liability under § 1983. The Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), tacitly recognized a *Bivens* cause of action seeking to impose supervisory liability against a federal prison warden for violating an inmate's Eighth Amendment rights by allegedly taking inadequate steps to protect the inmate from assault. But *Farmer* does not address the availability of a *Bivens* action against high-level Executive Branch officials many steps removed from the prisoner, nor does it address the availability of a *Bivens* action in a case raising national security issues.

Review is warranted on the second Question Presented not only to resolve the conflict among the federal appeals courts regarding supervisory liability of

government officials, but also to resolve the conflict between the decision below and the decisions of this Court that mandate immunity for high-level federal government supervisory personnel when, as here, it has not previously been "clearly established" that the federal courts recognize an implied *Bivens* action for deficient supervision.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: March 7, 2008

PETITIONER'S BRIEF

Supreme Court, U.S.
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No. 07-1015

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
JONATHAN F. COHN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT M. LOEB
SARANG VIJAY DAMLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a conclusory allegation that a Cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether a Cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following six individuals were parties in the court of appeals. Each of them was a defendant in the district court and an appellant in the court of appeals:

Dennis Hasty, former Warden of the Metropolitan Detention Center; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons; Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation.

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In the Supreme Court of the United States

No. 07-1015

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 490 F.3d 143. The memorandum and order of the district court dismissing some, but not all, of the claims against petitioners (Pet. App. 71a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2007. Petitions for rehearing were denied on September 18, 2007 (Pet. App. 151a-152a). On December 7, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and in-

cluding January 16, 2008. On January 4, 2008, Justice Ginsburg further extended the time to February 6, 2008, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 16, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Immediately after the attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) and other parts of the United States Department of Justice launched an investigation of unprecedented size to identify those involved in the attacks and to disrupt any follow-on attacks. "Within 3 days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation," and "[b]y September 18, 2001, the FBI had received more than 96,000 leads from the public." Pet. App. 76a n.4.

In the first two months of the investigation, the FBI questioned more than one thousand people suspected of having some link specifically to the September 11 attacks or generally to terrorism. See Office of the Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, at 1 (Apr. 2003) <http://www.usdoj.gov/oig/special/0306/full.pdf> (*OIG Report*).[1] Many of those were released without any charge, but 762 individuals were held on immigration charges. *Id.* at 2, 15. A subset of 184 mem-

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[1] The district court's opinion resolving motions to dismiss cited the *OIG Report*, a public document. See Pet. App. 76a n.4, 77a n.5, 114a, 116a & n.20. Much of the report (specifically, the preliminary pages and pages 1-26, 37-71, and 111-164) was included in the joint appendix in the court of appeals. See C.A. App. 128-249.

bers of that group were deemed to be "of high interest" to the terrorism investigation. *Id.* at 111. Those "high interest" detainees were housed in Bureau of Prison facilities under protective conditions aimed at preventing them from communicating with any co-conspirators who might still be at large. *Id.* at 19, 25. The remainder were deemed to be "of interest" to the investigation and held in less-restrictive conditions. *Id.* at 25.

2. Respondent Iqbal is a Pakistani citizen who was arrested by federal officials in New York City in November 2001 and detained at the Metropolitan Detention Center (MDC) in Brooklyn pending trial on charges of conspiracy to defraud the United States and fraud in relation to identification documents. Pet. App. 2a-4a & n.1.[2] He does not challenge his arrest. For part of the time he was detained at the MDC (between January and July 2002), he was, like others deemed to be "of high interest" to the September 11 investigation, not housed with the general prison population but held in restrictive conditions in the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.* at 4a, 73a. Respondent ultimately pleaded guilty to the criminal charges against him and, after the period at issue in this lawsuit, was sentenced to a 16-month term of imprisonment and later removed to Pakistan. *Id.* at 7a, 73a n.1.

After his release and removal to Pakistan, respondent sued 34 current and former federal officials, 19 "John Doe" federal correction officers, and the United States, asserting in most of his claims that he was badly mistreated by prison employees during his detention. Pet. App. 7a n.3, 87a-91a (summarizing claims against

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[2] Although other defendants-appellants in the court of appeals are also respondents in this Court by virtue of Supreme Court Rule 12.6, references in this brief to "respondent" are to Iqbal.

each defendant); *id.* at 157a-163a (Compl. ¶¶ 10-45) (identifying defendants). The defendants range from the individual prison officials who allegedly had contact with respondent, to the wardens of the facility where respondent was held, all the way up the chain of command to the petitioners here: the Director of the FBI and a former Attorney General of the United States.

The bulk of the allegations are focused on the asserted acts of the lower-level prison employees who had direct contact with respondent. Respondent does not specifically tie those acts to petitioners. Instead, he alleges, in relevant part, that petitioners are responsible (along with others) for the decision, made by lower-level officials two months after his arrest, to detain him under highly restrictive conditions of confinement as someone "of high interest" to the September 11 investigation. He claims that decision reflected unlawful racial and religious discrimination, for which petitioners (and others) are personally liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and as co-conspirators under 42 U.S.C. 1985(3).[3] He seeks compensatory and punitive damages, as well as attorney's fees and costs. Pet. App. 202a-203a, 207a, 209a, 214a (Compl. ¶¶ 233, 236, 248, 251; prayer for relief).

To support his claim of unlawful discrimination, respondent alleges that, "[i]n many cases," detainees were classified as being "of high interest" because of their race, religion, or national origin instead of "any evidence

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[3] Respondent's remaining claims against petitioners were dismissed on other grounds, and are not at issue in this appeal. A separate suit also arising out of the treatment of September 11 detainees is pending before the Second Circuit and raises issues not presented here. See *Turkmen* v. *Ashcroft*, No. 06-3745-cv (2d Cir. argued Feb. 14, 2008).

of the detainees' involvement in supporting terrorist activity." Pet. App. 164a (Compl. ¶¶ 48-49). Moreover, according to respondent, "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September-11th investigation." *Id.* at 165a (Compl. ¶ 52).

In attempting to tie petitioners to those allegedly unconstitutional practices, respondent claims that they approved a policy of detaining suspects determined to be "of high interest" to the investigation into the September 11 attacks "in highly restrictive conditions of confinement until they were 'cleared' by the FBI." Pet. App. 168a (Compl. ¶ 69). He specifically alleges that two lower-level FBI officials were actually responsible for implementing that policy, and that they selected him as a "high interest" suspect on the basis of discriminatory criteria. See *id.* at 164a-165a (Compl. ¶ 51) (alleging that respondent was selected by defendants Rolince and/or Maxwell as a "high interest" suspect because of his race, religion, or national origin); *id.* at 169a (Compl. ¶ 76) (alleging that defendants Rolince and Maxwell refused to clear detainees for release to the general population "based simply on the detainees' race, religion, and national origin"). He does not, however, allege that petitioners engaged in any such conduct.

Instead, respondent asserts that, as Attorney General, petitioner Ashcroft had "ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws" and was "a principal architect of the policies and practices challenged here." Pet. App. 157a (Compl. ¶ 10). He alleges that, as Director of the

FBI, petitioner Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here," *ibid.* (Compl. ¶ 11), and that the FBI, "under the direction of [petitioner] Mueller, arrested and detained thousands of Arab Muslim men" in the course of investigating the September 11 attacks, *id.* at 164a (Compl. ¶ 47). Finally, he alleges that petitioners Ashcroft and Mueller (among others) "knew of, condoned, and willfully and maliciously agreed to subject [him] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 172a-173a (Compl. ¶ 96).

3. Petitioners (and other defendants) moved to dismiss the claims against them on the ground that, *inter alia*, they are entitled to qualified immunity. In relevant part, the district court refused to dismiss the *Bivens* and conspiracy claims against petitioners. Pet. App. 133a-137a, 142a-146a, 150a. The court ruled that allegations that respondent was confined in significantly harsher conditions solely because of his race and religion were sufficient to state a violation of clearly established law, and that he had adequately alleged personal involvement by petitioners in the adoption of the allegedly discriminatory policy regarding detainees "of high interest." *Id.* at 133a-137a, 142a-146a.

The district court acknowledged that personal involvement was "a closer question" for the several defendants (including petitioners) who were higher in the chain of command than the wardens of the MDC. Pet. App. 116a. Indeed, the district court noted that the "assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim." *Ibid.* Nevertheless, it con-

cluded that the "unique context" of the September 11 investigation supported respondent's "assertions that [petitioners] were involved in creating and/or implementing the detention policy under which [respondent was] confined." *Id.* at 116a, 146a. The district court thus found, with respect to each of the relevant counts, that it was unable to conclude that there was "no set of facts" on which respondent would be entitled to relief from petitioners. *Id.* at 135a-137a, 146a.

4. a. The court of appeals affirmed in relevant part. Pet. App. 1a-70a. It focused on "several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11." *Id.* at 2a. The court of appeals acknowledged that, as supervisory officials, petitioners could be held responsible only to the extent they had "personal involvement" in the unconstitutional acts of their subordinates. *Id.* at 14a. Relying on circuit precedent involving 42 U.S.C. 1983, however, it held that:

> The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated.

Pet. App. 14a.

In addressing the pleading requirements for such a claim, the court of appeals observed that this Court's decisions in this area are "not readily harmonized." Pet. App. 15a; see *id.* at 15a-27a (discussing *Leatherman* v.

Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002); *Crawford-El* v. *Britton*, 523 U.S. 574 (1998); and *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007)). The court of appeals then interpreted those decisions, including the recent decision in *Bell Atlantic*, as requiring "a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* at 25a.

The court of appeals saw "some merit" in the view that a more rigorous standard should be applied where a defendant asserts qualified immunity. Pet. App. 25a. It recognized that "qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation." *Ibid.* Here, in particular, the court found that "some of [respondent's] claims are based *not on facts* supporting the claim *but, rather, on generalized allegations* of supervisory involvement," and it conceded that allowing such claims to proceed "might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent." *Ibid.* (emphases added). Nevertheless, the court of appeals believed it was bound to apply the more "flexible 'plausibility standard'" it described. *Ibid.*; see *id.* at 25a-26a.

Applying its standard for "personal involvement" of supervisory officials and its "plausibility standard" to claims against petitioners, the court of appeals held that respondent had sufficiently pleaded valid claims against petitioners for racial and religious discrimination under *Bivens* and for conspiracy to violate his civil rights. Pet. App. 62a-63a, 65a. The court concluded that the allega-

tions that respondent was deemed to be "of high interest" to the September 11 investigation solely because of his race and religion were sufficient to make out claims of unlawful discrimination against petitioners. *Id.* at 59a. Relying on *Crawford-El* and *Swierkiewicz* as well as prior circuit precedent, the court held that such conclusory allegations of discriminatory motive were sufficient to survive a motion to dismiss. *Id.* at 61a. In particular, the court pointed to respondent's allegation that all Arab Muslim men arrested on criminal or immigration charges in the New York region in the course of the FBI's investigation into the September 11 attacks were initially classified as being "of interest." *Ibid.*

The court of appeals also held that the allegations against petitioners were sufficient to establish their personal involvement in or responsibility for the alleged discriminatory conduct. Pet. App. 62a. In reaching that conclusion, the court cited respondent's allegations that they "were instrumental in adopting the 'policies and practices challenged,'" that thousands of Arab Muslims were arrested by the FBI "under the direction of [petitioner] Mueller," and that petitioners Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [respondent] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Ibid.*

Although the court acknowledged that respondent alleged that officials other than petitioners had selected respondent as a "high interest" detainee, it concluded that "does not necessarily insulate [petitioners] from personal responsibility for the actions of their subordinates under the standards of supervisory liability" in the Second Circuit. Pet. App. 62a. In particular, the court

concluded that there was no need to allege "subsidiary facts" in these circumstances "because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." *Ibid.*

b. Judge Cabranes joined the court of appeals' opinion, but filed a separate concurrence to "underscor[e] that some of [this Court's] precedents are less than crystal clear" in this area. Pet. App. 68a. In addition, he highlighted the "uneasy compromise" that the court struck between a qualified-immunity doctrine properly "rooted in the need to preserve the 'effectiveness of government as contemplated by our constitutional structure'" and this Court's interpretation of general civil pleading requirements. *Ibid.* (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 820 n.35 (1982)). Judge Cabranes expressed concern that the result could undermine the "important policy interest" of "'enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.'" *Id.* at 70a (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, J., concurring in the judgment)).

In particular, Judge Cabranes explained that, even though most of the conduct respondent complains about is alleged to have been carried out by lower-level officials, "it is possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and possibly to a jury trial, regarding [respondent's] claims." Pet. App. 69a. Judge Cabranes also emphasized that concerns about discovery abuse are "all

the more significant in the context of a lawsuit against * * * federal government officials charged with responsibility for national security and entitled by law to assert claims of qualified immunity." *Ibid.* Furthermore, Judge Cabranes expressed concern that "little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 69a-70a.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the former Attorney General and Director of the FBI may be subjected to the demands of discovery and potentially a trial based on the highly generalized and speculative allegations made by respondent concerning their involvement in the wrongs allegedly committed by others.

I. It is well settled that government officials such as petitioners are entitled to qualified immunity from damages suits in their personal capacity, because such immunity aids "the effective functioning of government." *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974). "[T]here is a strong public interest in protecting public officials from the costs associated with the defense of damages actions," *Crawford-El* v. *Britton*, 523 U.S. 574, 590 (1998), because such lawsuits inevitably "diver[t] * * * official energy from pressing public issues," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and risk deterring officials' "willingness to execute [their] office with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 240. Those concerns are especially pronounced in "matters of national security

and foreign policy" and with respect to Cabinet-level and other high-ranking officials, such as petitioners, who are "easily identifiable target[s] for suits for civil damages." *Mitchell* v. *Forsyth*, 472 U.S. 511, 541-542 (1985) (Stevens, J., concurring in the judgment) (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982)).

Recognizing that overly permissive pleading standards can be inconsistent with the purposes of qualified immunity, the Court has countenanced a "firm application of the Federal Rules of Civil Procedure" in the qualified-immunity context, *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), and instructed district courts to "insist" that a plaintiff "'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury" before allowing a suit "to survive a prediscovery motion for dismissal or summary judgment," *Crawford-El*, 523 U.S. at 598 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). And, even outside the sensitive qualified-immunity context, the Court has stressed that general federal pleading standards should be firmly applied, and that a complaint must allege sufficient facts to cross "the line between possibility and plausibility." *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966 (2007).

This Court has emphasized that qualified-immunity claims must be analyzed in light of "the specific context of the case," *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001), and context likewise bears on the showing necessary to satisfy the established pleading standards. Because of the nature of their positions, it is less likely as a general matter that high-ranking officials will be personally involved in wrongdoing allegedly committed by officials far down the bureaucratic chain of command. As a general matter, therefore, it will be more difficult for a

plaintiff to establish a plausible entitlement to relief against high-ranking officials under the established pleading standards. Importantly, in attempting to make such a showing, it is not sufficient for a plaintiff to show that the personal involvement of a high-ranking official in alleged wrongdoing by a lower-level official was among the realm of *possibilities*; rather, to survive a motion to dismiss, a plaintiff must plead facts sufficient to render the personal involvement and liability of such a high-ranking official plausible.

This case arises from the government's response to an unprecedented national-security crisis and, as pertinent here, involves claims against a former Attorney General and the current Director of the FBI. During the relevant time period, those officials were deluged with official demands and, among other things, headed the largest investigation in American history, involving thousands of law-enforcement agents. Applying the pleading standards established by this Court in light of the specific context of this case, respondent's conclusory allegations with respect to petitioners are inadequate to make the alleged grounds of wrongdoing clear and plausibly to suggest that petitioners themselves were personally involved in the alleged unlawful conduct of lower-level officials or otherwise violated clearly established law. Petitioners are therefore entitled to qualified immunity from respondent's suit.

II. The court of appeals also erred by relying upon the broad standards for supervisory liability that it has developed in the context of claims against state and local officials under 42 U.S.C. 1983. Although *Bivens* inferred the availability of a damages remedy against federal officials for certain violations of the Constitution, this Court has been wary of expanding the scope of that rem-

edy. See, *e.g.*, *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2597 (2007). It has explained that *Bivens* "is solely concerned with deterring the unconstitutional acts of individual officers" and not with "deterring the conduct of a policy-making entity," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 71 (2001), and it has thus refused to extend the remedy to suits against anyone other than the individual officers responsible for the alleged constitutional violation. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471 (1994). The logic of those cases similarly requires that high-level federal officials may be held liable only for their direct involvement in constitutional violations, or at least their deliberate indifference in the face of information that the rights of others are being violated.

That understanding is consistent with the long-standing principle that a government official may be held liable only for his own culpable actions, and not under a theory of *respondeat superior* or vicarious liability. See *Dunlop* v. *Munroe*, 11 U.S. (7 Cranch) 242, 269 (1812); see also *Robertson* v. *Sichel*, 127 U.S. 507, 515-516 (1888). Likewise, it ensures that supervisory liability under *Bivens* is not *broader* than it is in analogous circumstances under Section 1983, where this Court has foreclosed the imposition of liability on individual government officials on the basis that they had constructive notice of wrongdoing committed by third parties (including their subordinates). See, *e.g.*, *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Board of the County Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997).

Because respondent's complaint is focused on the alleged actions of lower-level officials, and respondent has failed adequately to allege anything other than constructive notice on the part of petitioners, the court of

appeals improperly expanded *Bivens* in permitting this action to proceed against petitioners.

ARGUMENT

I. RESPONDENT HAS FAILED TO ALLEGE FACTS SUFFICIENT TO OVERCOME PETITIONERS' DEFENSE OF QUALIFIED IMMUNITY

This Court has established several principles that govern the resolution of this case. First, district courts should engage in a "firm application" of the Federal Rules of Civil Procedure in considering motions to dismiss on the ground of qualified immunity. *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). Second, qualified-immunity claims should be resolved "at the earliest possible stage of litigation" to give effect to the policies underlying the qualified-immunity doctrine. *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam). Third, district courts should "insist" that a plaintiff "'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury" before allowing a suit "to survive a prediscovery motion for dismissal or summary judgment." *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998). And fourth, to survive a motion to dismiss, a complaint must allege sufficient facts to cross "the line between possibility and plausibility." *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966 (2007). Under those settled principles, the court of appeals erred in permitting this suit to proceed against petitioners.

A. As This Court Has Recognized, A Firm Application Of Pleading Standards Is Necessary To Vindicate The Purposes Served By Qualified Immunity

1. The qualified-immunity doctrine serves vital public interests

As this Court has observed, "there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions." *Crawford-El*, 523 U.S. at 590. A government official's immunity from suit is not "a badge or emolument of exalted office," but is instead firmly grounded upon principles of public policy—"a policy designed to aid in the effective functioning of government." *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974) (quoting *Barr* v. *Matteo*, 360 U.S. 564, 572-573 (1959)). The defense of qualified immunity thus prevents "the diversion of official energy from pressing public issues," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and preserves an official's "willingness to execute his office with the decisiveness and the judgment required by the public good," *Scheuer*, 416 U.S. at 239-240. It also ensures that able candidates for government office are not deterred from entering public service by the threat of damages suits. See *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992); *Harlow*, 457 U.S. at 814. As Judge Learned Hand observed long ago, to deny such immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). Accordingly, qualified immunity serves the larger purpose of "safeguard[ing] government," not just "benefit[ing] its agents." *Wyatt*, 504 U.S. at 168.

Of course, the immunity of most officials is qualified, rather than absolute, to ensure there is adequate deterrence of official action that runs afoul of clearly established constitutional or statutory limits. See *Harlow*, 457 U.S. at 819. But, as the Court has explained, "the importance of a damages remedy to protect the rights of citizens" must always be balanced against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.* at 807 (quoting *Butz*, 438 U.S. at 506).

The qualified-immunity defense granted to government officials is intended to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991); see also *Wyatt*, 504 U.S. at 165-169. It has thus been appropriately characterized as "an *immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). In other words, "the defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery . . . , as [i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (quoting *Mitchell*, 472 U.S. at 526) (alteration in original; some internal quotation marks omitted).

This Court has therefore "repeatedly * * * stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam). It is the responsibility of the district court "expeditiously to weed out suits * * * without requiring a defendant who rightly claims qualified immunity to engage in ex-

pensive and time consuming preparation to defend the suit on its merits." *Siegert*, 500 U.S. at 232-233; see also *Harlow*, 457 U.S. at 818 (until the "threshold immunity question is resolved, discovery should not be allowed").

The concerns underlying the qualified-immunity doctrine are at their height in suits, such as this, targeting high-ranking officials in matters involving national security. As Justice Stevens has explained, "[t]he passions aroused by matters of national security and foreign policy and the high profile of the Cabinet officers with functions in that area make them 'easily identifiable target[s] for suits for civil damages.'" *Mitchell*, 472 U.S. at 541-542 (Stevens, J., concurring in the judgment) (footnote omitted). Moreover, faced with the threat of such suits, "[p]ersons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions" for "fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office." *Id.* at 542. Or even worse, persons who accept such positions will perform their critically important duties with "potentially ruinous hesitation." *Id.* at 541.

Accordingly, this Court has recognized that "high officials require greater protection than those with less complex discretionary responsibilities." *Harlow*, 457 U.S. at 807. The "substantial social costs" of permitting suit, "including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties," *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987), are more pronounced in the case of officials who have broad policy-making duties. Indeed, when this Court denied certain federal officials *absolute* immunity from suit, it stressed

that "plaintiffs may not play dog in the manger" and predicted—as it turned out somewhat optimistically—that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz*, 438 U.S. at 508.

These concerns are directly implicated by this case. The court of appeals' decision subjects a former Attorney General of the United States and the Director of the FBI to the demands of further litigation, including discovery, based on a conclusory allegation that they "knew of" or "condoned" (Pet. App. 172a-173a (¶ 96)) actions allegedly taken by lower-level officials in the context of the largest investigation ever conducted in the history of the Nation, in the wake of the deadliest foreign attack on American soil. In the aftermath of any future national-security crisis, the last thing that the Nation should fear is that its leaders will act with "potentially ruinous hesitation," *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in the judgment), because of concerns—based on *Bivens* litigation such as this—that they may be subjected to the burdens of personal-capacity litigation based on bare allegations that they "knew of" or "condoned" actions allegedly taken by one or more of the potentially thousands of officers involved in the government's response to that crisis.

2. Proper application of pleading standards is critical to giving effect to the qualified-immunity doctrine

The fundamental policies served by qualified immunity are undermined by an unduly permissive application of general civil pleading standards, like the one employed by the court of appeals here. An overly permissive approach permits a plaintiff to thwart immunity by making conclusory and non-specific allegations of official

wrongdoing, thus preventing the court from making an early determination whether qualified immunity is warranted. See *Siegert*, 500 U.S. at 232. Those problems are particularly acute in the case of high-ranking officials such as the Attorney General and the Director of the FBI, because if they can be subjected to the demands of litigation based solely on the sort of conclusory allegations at issue here, then, as Judge Cabranes recognized, they could be added to virtually any complaint challenging the alleged actions of lower-level officers "following the blueprint laid out by this lawsuit." Pet. App. 70a (concurring opinion).

Where, as here, an unconstitutional motive is an element of the alleged illegality, a lax pleading standard also makes it all-too-easy for plaintiffs to impose unwarranted burdens on government officials. This Court has explained that such cases present a "potentially serious problem" because "an official's state of mind is easy to allege and hard to disprove, [and] insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El*, 523 U.S. at 584-585 (internal quotation marks omitted). Subjecting officials to the threat of suit whenever their proper and lawful actions could be misconstrued as being improperly motivated—or merely *alleged* to have been tainted by an improper motive—almost certainly will affect their "willingness to execute [their] office[s] with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 240. Such lawsuits, therefore, raise the same policy concerns that forced this Court to "completely reformulate[] qualified immunity" by adopting an objective rather than subjective standard. *Anderson*, 483 U.S. at 645; see also *Wyatt*, 504 U.S. at 170-171

(Kennedy, J., concurring) ("The transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits.").

This Court has previously recognized that motive-based claims "implicate[] obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages." *Crawford-El*, 523 U.S. at 584-585. And to address those concerns, the Court has admonished that trial courts should "insist that the plaintiff 'put forward *specific, nonconclusory* factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)) (emphasis added). That requirement is critical to promoting the policies underlying the qualified-immunity doctrine and squares with a proper understanding of the general pleading standards established by the Federal Rules of Civil Procedure.

B. *Bell Atlantic* Clarified The General Civil Pleading Standards Governing Federal Claims, Including Those Implicating Qualified Immunity

A proper application of the general federal pleading standards is also critical to ensuring that this Court's qualified-immunity decisions are respected.

1. Despite this Court's teachings, the lower courts have struggled with what Judge Cabranes called the "uneasy compromise" (Pet. App. 68a) between protecting the substance of the qualified-immunity doctrine and applying liberal pleading standards. See, *e.g.*, *Thomas* v. *Independence Twp.*, 463 F.3d 285, 299 (3d Cir. 2006) (discussing "the incompatibility between the concept of notice pleading and the qualified immunity doctrine, and

the resulting quandary faced by defendants"); *Jacobs* v. *City of Chicago*, 215 F.3d 758, 765 n.3 (7th Cir. 2000) (noting the "tension in this area"); *Schultea* v. *Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc) ("The contention that a federal procedural rule conflicts with a substantive right is problematic."); cf. *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment) (concluding that a departure from the normal pleading rule would be justified because "[t]he substantive defense of immunity controls"). That effort was made particularly difficult by the long-standing axiom that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

Conley's "no set of facts" language had led some courts to permit even thinly pleaded complaints against government officials to survive motions to dismiss, despite this Court's repeated admonition to resolve qualified-immunity issues as expeditiously and early in a case as possible. See, *e.g.*, *Robbins* v. *Oklahoma*, 519 F.3d 1242, 1246 (10th Cir. 2008) (noting that under *Conley*, "a complaint was immune from dismissal if it left open the possibility that a fact not alleged in the complaint could render the complaint sufficient"); *Alvarado* v. *Litscher*, 267 F.3d 648, 651-652 (7th Cir. 2001) ("Because an immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate: [T]he plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity.") (brackets in original). The district court in this case—which specifically invoked the "no set of facts" language, Pet. App. 96a, 135a-137a, 146a—committed precisely that error.

2. In *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007), this Court disavowed *Conley*'s statement that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," 355 U.S. at 45-46, declaring unequivocally that, "this famous observation has earned its retirement," *Bell Atl. Corp.*, 127 S. Ct. at 1969. At the same time, the Court clarified that Federal Rule of Civil Procedure 8(a) establishes a "plausibility" threshold: "The need at the pleading stage for allegations *plausibly suggesting* (not merely consistent with) [actionable conduct] reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to '*sho[w]* that the pleader is entitled to relief.'" *Bell Atl. Corp.*, 127 S. Ct. at 1966 (emphases added).

The Court further explained that, "to enter the realm of plausible liability," a complaint must cross two hurdles. *Bell Atl. Corp.*, 127 S. Ct. at 1966 n.5. First, a plaintiff's allegations must cross "the line between the conclusory and the factual." *Ibid.* As the Court emphasized, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-1965 (citing *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986)). Instead, the complaint must contain sufficient "factual matter" to "raise a right to relief above the speculative level" and to "raise a reasonable expectation that discovery will reveal evidence of" illegal activity. *Id.* at 1965.

Second, a plaintiff's factual allegations must also do more than create a *suspicion* of actionable wrongdoing: "[F]actually neutral" allegations—*i.e.*, allegations that are consistent with lawful behavior—are inadequate to

defeat a motion to dismiss. *Bell Atl. Corp.*, 127 S. Ct. at 1966 n.5. Instead, a complaint must make "factually suggestive" allegations from which a reasonable inference of illegal conduct may be drawn. *Id.* at 1965-1966 & n.5.

For instance, the plaintiffs in *Bell Atlantic* claimed that a number of companies had engaged in an antitrust conspiracy in violation of Section 1 of the Sherman Act based entirely on factual allegations describing parallel business conduct. Because, "in light of common economic experience," those facts were just as easily explained by legitimate conduct, the Court held that plaintiffs' factual allegations were insufficient to state a valid Section 1 claim. See *id.* at 1971-1973; see also *id.* at 1971 ("[I]f alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a [Section] 1 violation against almost any group of competing business would be a sure thing."). Absent specific factual allegations that were suggestive of illegal conduct (rather than "factually neutral allegations"), the Court explained, it would be "hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 1965 n.3.

The Court in *Bell Atlantic* also specifically rejected the suggestion that "a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,'" noting that "the success of judicial supervision in checking discovery abuse has been on the modest side." 127 S. Ct. at 1967. It concluded that the only way "to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence'" is to "tak[e] care to require allegations that reach the

level suggesting" illegal conduct. *Ibid.* (quoting *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005)) (brackets in original). The theoretical possibility of prescribing "phased" or "limited" discovery cannot serve as an adequate safeguard, because "the hope of effective judicial supervision is slim." *Id.* at 1968 n.6.

Finally, in concluding that the plaintiffs in *Bell Atlantic* had failed adequately to plead illegal conduct under a proper understanding of the Federal Rules of Civil Procedure, the Court rejected the suggestion that it had adopted a "'heightened' pleading standard." *Bell Atlantic Corp.*, 127 S. Ct. at 1973 n.14. Rather, the Court explained, it had simply concluded that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Ibid.*

3. *Bell Atlantic* was decided after this case was briefed and argued, but before the court of appeals handed down its decision. The court of appeals recognized and attempted to apply *Bell Atlantic* in its decision. See Pet. App. 19a-25a. But it believed that *Bell Atlantic* had sent "conflicting signals" on the pleading standards it applied and had simply "created" more "uncertainty concerning the standard for assessing the adequacy of pleadings." *Id.* at 19a, 24a; see *id.* at 20a ("the Court's explanation contains several, not entirely consistent, signals"). And ultimately, the court of appeals concluded that *Bell Atlantic* did not change much, and had merely intended to adopt a "*flexible* 'plausibility standard.'" *Id.* at 25a (emphasis added).

Moreover, to address the concerns that its "flexible" standard might not adequately protect the interests underlying the qualified-immunity doctrine—particularly in the case of "high-level officials" such as petitioners —the court of appeals resorted to precisely what this

Court deemed inadequate in *Bell Atlantic*. In *Bell Atlantic* this Court admonished that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" 127 S. Ct. at 1967. Yet, in discussing its "flexible" pleading standard, the court of appeals here observed that, "[i]n a case such as this where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court might wish to structure * * * limited discovery" to weed out claims. Pet. App. 26a.

Ultimately, as the court of appeals' application of its "flexible" pleading standard underscores, see Part I.D, *infra*, the court committed the same mistake that the district court had under the now-discredited "no set of facts" pleading-standard regime. That error has exposed petitioners to the burdens of discovery and further litigation if the decision below is not reversed. But even more problematic, as Judge Cabranes observed, "little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 69a-70a. The decision below therefore directly threatens the policies underlying the qualified-immunity doctrine.

C. In The Case Of Personal-Capacity Claims Against High-Ranking Officials, It Is Particularly Important To Apply The Plausibility Standard Faithfully

Bell Atlantic reaffirms that a complaint must establish that the plaintiff's claim for relief is not merely possible but at least plausible. See 127 S. Ct. at 1965-1966. Determining whether a given set of alleged facts is sufficient to state a claim is not possible in the abstract. Rather, such allegations must be considered in the particular context of the specific claims being raised, and thus "context" will affect "the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations." *Robbins*, 519 F.3d at 1248; see also *Phillips* v. *County of Allegheny*, 515 F.3d 224, 230-232 (3d Cir. 2008) (concluding that "[f]air notice under Rule 8(a)(2) depends on the type of case"); Pet. App. 25a (finding that the standard under *Bell Atlantic* "obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*"). That approach squares with this Court's direction that the qualified-immunity analysis must be "undertaken in light of the specific context of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001).

In the context of personal-capacity suits against high-ranking government officials, and the concomitant defense of qualified immunity, it is particularly important for courts to ensure that plaintiffs have adequately pleaded the factual grounds for their claims. As courts have observed, such suits "pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants." *Robbins*, 519 F.3d at 1249. Moreover, the further removed a defendant is from the alleged wrongdoing by

others, the more difficult it will be for a plaintiff to plead specific facts that (if true) *plausibly* suggest that the defendant may be liable based on the acts of others.

Because high-ranking officials such as the Attorney General and Director of the FBI ordinarily tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command, a complaint against such high-ranking officials predicated on allegedly illegal conduct by such lower-level officers will have to allege sufficient facts to make it plausible that the high-ranking officials were in fact personally involved in the alleged illegal conduct. At the same time, absent the requisite subsidiary facts to make such a claim plausible, conclusory allegations that a high-ranking official "knew of" or "condoned" a specific act by a lower-level officer will be inadequate.

Accordingly, to effectuate the purposes of qualified-immunity doctrine, a proper application of the pleading standards articulated by this Court in cases like *Crawford-El* and *Bell Atlantic* must allow a claim of qualified immunity to be overcome at the motion-to-dismiss stage only if the plaintiff provides specific, nonconclusory factual allegations sufficient to plausibly suggest that a high-level government official violated a clearly established right. To pass this threshold, a complaint must cross "the line between *possibility* and plausibility." *Bell Atlantic Corp.*, 127 S. Ct. at 1966 (emphasis added). Just as in *Bell Atlantic*, this does not impose a "'heightened' pleading standard," but rather simply requires that a plaintiff show an "entitlement to relief" that is "plausible," *id.* at 1973 n.14, and recognizes the reality that it will ordinarily be more difficult for a plaintiff to do so when his claim is that the Attorney General of the United States, or another high-ranking official,

should be held legally responsible for the alleged illegal conduct of a lower-level officer.

Moreover, as *Bell Atlantic* underscored, when such facts are absent from a complaint, "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" 127 S. Ct. at 1967. That observation is particularly true with respect to claims against high-ranking officials. Cf. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 386 (2004) (noting, in the context of official-capacity suits, that "[a]lthough under Federal Rule of Civil Procedure 11, sanctions are available, and private attorneys also owe an obligation of candor to the judicial tribunal, these safeguards have proved insufficient to discourage the filing of meritless claims against the Executive Branch"). Accordingly, the court of appeals' suggestion here that the purposes of qualified immunity can be adequately protected by trusting the district court to "exercis[e] its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct," Pet. App. 26a, was unfounded.

D. The Court Of Appeals Erred In Permitting Respondent's Conclusory Allegations Against Petitioners To Vitiate The Qualified Immunity Of Those High-Ranking Officials

Respondent has failed to allege facts sufficient to subject petitioners to the burdens of discovery and further litigation under the principles discussed above.

1. a. Even if true (as they are presumed to be at this stage), respondent's allegations do not show that his right to relief against petitioners was anything more than speculative, or possible, which is not sufficient under the pleading standards discussed above. He alleges that petitioners "approved" a policy of holding suspects deemed to be "of high interest" to the 9/11 investigation in highly restrictive conditions of confinement pending clearance by the FBI, Pet. App. 168a (Compl. ¶ 69), but he does not claim that the policy was itself discriminatory. Rather, he claims that the policy was implemented in a discriminatory fashion by two lower-level FBI officials, who were actually responsible for determining which suspects were "of high interest" to the 9/11 investigation. See *id.* at 164a-165a, 169a (Compl. ¶¶ 51, 76). Thus, respondent alleges only that "[i]n many cases," detainees were classified—by persons other than petitioners—as being "of high interest" because of their race, religion, and national origin, "not because of any evidence of the detainees' involvement in supporting terrorist activity." *Id.* at 164a (Compl. ¶¶ 48-49).

Respondent also alleges that, "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks * * * were immediately classified as 'of interest'" to the investigation. Pet. App. 165a (Compl. ¶ 52). But that allegation (even assuming it is true) says nothing about the decision respondent complains of here: his classification as a detainee "of *high* interest," which resulted in more restrictive conditions on his detention. Moreover, that allegation does not shed light on the treatment of other similarly situated arrestees, and therefore does not support an inference that the alleged policy—which applied

nationwide—was discriminatory on its face. And to the extent that investigators were focused on individuals already within the criminal-justice system in an area in which the attacks were carried out, who bore characteristics similar to the September 11 highjackers, that hardly establishes an invidious discriminatory intent.

b. Respondent's allegations do not suggest that petitioners were personally involved in any discriminatory decision, or that they personally acted with any invidious discriminatory purpose toward respondent. To the contrary, they suggest a *lack* of personal involvement. The complaint alleges that (1) respondents approved a general policy, Pet. App. 168a (Compl. ¶ 69); (2) the general policy was not discriminatory on its face, but rather in application, *id.* at 164a (Compl. ¶¶ 48-49); and (3) other defendants made the individual determinations at issue, *id.* at 164a-165a (Compl. ¶¶ 50-51). Respondent does not allege that either petitioner participated in any classification decision, or that either of them knew which detainees were classified as being "of high interest," or even that either of them established the allegedly discriminatory criteria that were used by subordinate officials. Nor does respondent allege any communications between petitioners and the individuals who are specifically alleged to have made the classification at issue, or that petitioners knew of any particular activities taken by the other defendants as to respondent.

Respondent also makes a few general and broad allegations, devoid of any supporting facts, that petitioners were indirectly involved in discriminatory decisions affecting how he was housed. Respondent calls petitioner Ashcroft a "principal architect" of unwritten policies and says petitioner Mueller was "instrumental" in the "adoption, promulgation, and implementation" of those

unwritten policies. Pet. App. 157a (Compl. ¶¶ 10-11). He further alleges that all of the defendants (including petitioners) "knew of, condoned, and willfully and maliciously agreed to subject [him] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 172a (Compl. ¶96). But such bare-bones, conclusory allegations are insufficient to survive a motion to dismiss. As *Bell Atlantic* explained: "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"; rather, a plaintiff's factual allegations must do more than create a suspicion of actionable wrongdoing. 127 S. Ct. at 1964-1965; see also *id.* at 1966 n.5 (allegations must cross "the line between the conclusory and the factual").

All of the alleged conduct here was purportedly committed by officers down the chain of command from petitioners. See Pet. App. 164a-165a (Compl. ¶¶ 50-51). Specifically, respondent alleges that the discriminatory decision to classify him as being "of high interest" was made by Michael Rolince, the former Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and Kenneth Maxwell, a former FBI Assistant Special Agent in Charge in the New York Field Office. *Id.* at 164a-165a (Compl. ¶¶ 50-51). Given the complete absence of any "factual matter" (*Bell Atl. Corp.*, 127 S. Ct. at 1965) that plausibly suggests petitioners' direct personal involvement in any discriminatory decision, all that remains are respondent's allegations that petitioners had ultimate supervisory authority over subordinate officials who implemented the confinement policy, as part of their ultimate responsibility for investi-

gating and prosecuting violations of federal criminal law. See Pet. App. 157a, 164a (Compl. ¶¶ 10, 11, 47).[4] But, as explained below (see Part II, *infra*), the mere fact of ultimate supervisory authority over lower-level officials (or a corresponding inference of constructive knowledge) is not an adequate basis for holding petitioners personally liable for alleged wrongdoing, absent facts showing personal involvement.

c. Respondent's general allegations—essentially that the Attorney General and the FBI Director ultimately supervised the investigation into the September 11 attacks, and that many Arab Muslim men were identified as being "of high interest" in connection with that investigation—are fully consistent with lawful behavior on petitioners' part. In *Bell Atlantic*, this Court held that similar, "factually neutral" allegations were inadequate to defeat a motion to dismiss. 127 S. Ct. at 1966 n.5. Instead, a complaint must allege facts sufficient to make an inference of unlawful conduct plausible, not merely possible, and allegations that are fully consistent with lawful behavior do not "raise a right to relief above the

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[4] In distinguishing petitioners from subordinate officers such as Rolince and Maxwell, the key point is that respondent's allegations about petitioners—who are much more highly-ranked—are less specific, more factually neutral, and more conclusory than are his allegations about lower-level employees. Petitioners do not suggest that Rolince and Maxwell are liable, or even that respondent has adequately pleaded claims against them. To the contrary, those officers were making difficult judgments in a massive, constantly evolving international investigation, made more difficult by the uncertain nature and scope of the threat and the national-security interests at stake. Respondent's allegation that his own classification resulted from a discriminatory animus is implausible, particularly when a substantial majority of detainees (578 of 762) were *not* deemed "of high interest" and placed in restrictive terms of confinement. *OIG Report* at 2, 111.

speculative level." See *id.* at 1965. The responsibility to allege sufficient facts to suggest unlawful conduct is particularly important here; petitioners' supervisory responsibilities are not merely consistent with lawful behavior—as was the parallel conduct alleged in *Bell Atlantic*—but are part and parcel of their high offices.

Nor can any inference of illegitimate conduct be drawn from the allegation that "[i]n many cases," detainees who were classified as being "of high interest" were Arab, Muslim, or both. Pet. App. 164a (Compl. ¶ 49). An "invidious discriminatory purpose" is a required element of an equal protection claim. See *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). In the early days of the investigation, the government learned that the attacks had been carried out at the direction of Osama bin Laden, leader of al Qaeda, a fundamentalist Islamist group, motivated by religious extremism. The 19 hijackers were from Arab nations and believed to be Islamic fundamentalists. Given the unprecedented threat the Nation faced in the days, weeks, and months following the September 11 attacks, the overwhelming size of the investigation, the limited information at the government's disposal, and the need to identify those responsible for the atrocities before they could carry out additional attacks, any focus on individuals who had already entered the criminal-justice system in an area where attacks were carried out and who might share the same radical ideology as the attackers would have been a sensible means of limiting the investigation without violating equal-protection guarantees.[5] Accordingly, the

[5] Of course, the qualified-immunity inquiry must be conducted from the perspective of the defendants at the time of the allegedly illegal conduct, and not "with the 20/20 vision of hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). In the days, weeks, and months following

bare allegation that those deemed to be "of high interest" to the September 11 investigation were Arab or Muslim men is insufficient on its own to suggest illegal conduct. Cf. *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (noting that the qualified-immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition") (quoting *Saucier*, 533 U.S. at 201).

Similarly, if petitioners were aware that a high proportion of Arab or Muslim men were among detainees "of high interest," that alone would not have given them cause to believe that the list reflected racial or religious discrimination—any more than would a predominance of Irish suspects in an investigation of the IRA. Thus, just as in *Bell Atlantic*, petitioners had a duty to come forward with sufficient factual allegations suggestive of discriminatory intent on petitioners' part, to "hedge[] against false inferences" drawn from facts that are easily explained by lawful behavior. 127 S. Ct. at 1964.[6]

d. The court of appeals simply assumed that, in light of the importance of the investigation into the September 11 attacks, there was a "likelihood that these senior officials would have concerned themselves with the for-

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September 11, 2001, the Nation—and petitioners—did not know whether or to what extent additional attacks were in the works, adding uncertainty and urgency to the vitally important mission that petitioners undertook in overseeing the investigation into the attacks.

[6] The inference that respondent asks the Court to entertain—that the Attorney General and FBI Director instructed lower-level officials to classify respondent as being of high interest solely on account of his race, religion, or ethnicity—is especially inapposite considering that such direction would have been inconsistent with the Department's own regulations and formal policies, as well as the presumption that government officials comply with such regulations. See *USPS* v. *Gregory*, 534 U.S. 1, 10 (2001).

mulation and implementation of policies" for "high interest" suspects, and therefore it followed that petitioners "condoned and agreed to the discrimination that the Plaintiff alleges." Pet. App. 62a; see also *id.* at 43a ("[I]t is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies."). But such speculation is not sufficient to state—or attempt to salvage—a personal-capacity claim.

As discussed, to survive a motion to dismiss, the allegations of the complaint must state a plausible, not merely possible, entitlement to relief. See *Bell Atl. Corp.*, 127 S. Ct. at 1966. That means, as *Bell Atlantic* illustrates, that it is not enough for a plaintiff to show that unlawful conduct was simply "among the realm of 'plausible' possibilities." *Id.* at 1963. A contrary approach would reestablish the very practice rejected by this Court in *Bell Atlantic* of allowing "a wholly conclusory statement of claim" to survive a motion to dismiss based on the mere "possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 1968 (brackets in original).

This case illustrates the hazards of such speculation. As the district court noted, the investigation was nothing short of "massive." Pet. App. 76a n.4. "Within 3 days [of September 11, 2001], more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation," and "[b]y September 18, 2001, the FBI had received more than 96,000 leads from the public." *Ibid.* Given the unprecedented size of the investigation, there is every reason to assume that the

Attorney General and the Director of the FBI did *not* personally do more than—as respondent specifically alleges—approve a general policy of using highly restrictive confinement for any detainee "of high interest" until it could be established that he was not connected with terrorist activities. Indeed, it is highly *im*plausible to think that—particularly when faced with a national-security crisis on the level of the September 11 attacks—the Attorney General and the FBI Director were involved in the granular decisions about which respondent complains. The court of appeals' contrary assumption not only lacks common sense, but contravenes the longstanding presumption of regularity accorded decisions by government officials. See *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926).

Accordingly, because respondent has failed to "put forward *specific, nonconclusory* factual allegations" of unlawful conduct on petitioners' part, *Crawford-El*, 523 U.S. at 598 (emphasis added), and the factual allegations in the complaint that are directed to petitioners do not show an entitlement to relief against petitioners that is anything more than speculative, the courts below should have granted petitioners' motion to dismiss.

2. In holding otherwise, the court of appeals invoked *Crawford-El* and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002). Pet. App. 61a-62a. But those cases lend no weight to the conclusion that an allegation of culpable mens rea, unsubstantiated by any predicate facts about the conduct that is the alleged basis for liability, is enough to defeat summary disposition. If anything, they highlight the deficiencies in respondent's complaint. See *Bell Atl. Corp.*, 127 S. Ct. at 1965-1966 (noting that "prior rulings and considered views of leading commen-

tators" are useful in identifying facts that are suggestive enough to demonstrate illegal conduct).

In both *Crawford-El* and *Swierkiewicz*, the complaints provided clear notice to the defendant of the specific conduct alleged to give rise to liability (*i.e.*, the who, what, and when of the alleged wrongdoing). In *Crawford-El*, the plaintiff prisoner alleged that the defendant corrections officer had deliberately misdelivered his box of personal belongings by asking his relative to pick them up rather than ship them to his next destination, and that she had done so in retaliation for the plaintiff's participation in unfavorable press reporting about the prison. See 523 U.S. at 578-579. The plaintiff also alleged that the defendant had made specific statements about the plaintiff that revealed a retaliatory motivation. See *id.* at 579 n.1.

Similarly, in *Swierkiewicz*, the plaintiff alleged that he was demoted by his employer's Chief Executive Officer (CEO) and that the bulk of his former duties were transferred to a younger employee; that the CEO later said he wanted to "energize" his department and appointed the younger and less-qualified employee to the plaintiff's prior position; and that, following his demotion, the plaintiff was isolated by his supervisor and excluded from business decisions. See 534 U.S. at 508-509. After outlining those grievances, the plaintiff was given the choice of resigning without a severance package and, when he refused to do so, was fired. See *id.* at 509. The complaint "detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Id.* at 514.

Thus, the only issue before this Court in both cases was the showing of discriminatory motive necessary to

defeat summary disposition of the claims. See *Crawford-El*, 523 U.S. at 577-578; *Swierkiewicz*, 534 U.S. at 513-514; see also Fed. R. Civ. P. 9(b) (requiring that fraud or mistake must be pleaded with particularity but that "[m]alice, intent, knowledge, and other condition of a person's mind may be alleged generally"). Although this Court rejected heightened pleading standards applied by the courts of appeals in both cases, it nevertheless insisted on the "firm application of the Federal Rules of Civil Procedure" to "protect[] the substance of the qualified immunity defense." *Crawford-El*, 523 U.S. at 597 (internal quotation marks omitted).

Here, in sharp contrast to *Crawford-El* and *Swierkiewicz*, respondent's allegations do not identify any specific conduct alleged to be the basis for petitioners' individual liability. Respondent does not allege the *what* of liability (*i.e.*, any particular steps that the Attorney General or FBI Director took to approve, condone, or ratify the discriminatory selection of respondent as a "high interest" detainee). Respondent does not allege *when* this conduct allegedly took place, *who* was allegedly involved, or *where* it allegedly occurred. And respondent does not allege a factual basis for inferring that petitioners' allegedly culpable states of mind were the proximate cause of the allegedly discriminatory selection—by lower-level officials—of respondent as a detainee "of high interest" to the September 11 investigation. Cf. *Bell Atlantic*, 127 S. Ct. at 1971 n.10 (complaint could not satisfy Rule 8's notice requirements because it made no mention of any "specific time, place, or person involved in the alleged conspiracies").[7]

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[7] This Court's per curiam decision in *Erickson* v. *Pardus*, 127 S. Ct. 2197 (2007), is also distinguishable. That case involved Section 1983

3. Adherence to the pleading standards established by this Court's decision is particularly important in the context of this suit against high-level government officials who "were trying to cope with a national and international security emergency unprecedented in the history of the American Republic." Pet. App. 69a (Cabranes, J., concurring). The basic concern this Court expressed in *Bell Atlantic*—that permitting thinly pleaded complaints to survive motions to dismiss might unnecessarily impose "enormous" discovery expenses, see 127 S. Ct. at 1967—applies even more forcefully in this context. As Judge Cabranes recognized, "discovery would not only result in significant cost but would also deplete the time and effectiveness of current officials and the personal resources of former officials." Pet. App. 70a n.1. Similarly, petitioners' status as especially high-level officials is material, because such officials "require greater protection than those with less complex discretionary responsibilities." *Harlow*, 457 U.S. at 807.

There can be no doubt about the burdens that personal-capacity lawsuits visit upon high-level officials such as the Attorney General, even long after their tenures in office end. As Bennett Boskey recently ex-

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claims against prison officials. The Court held that a pro se prisoner's claims based on inadequate medical treatment were sufficient to survive a motion to dismiss because the complaint specifically alleged that the prison doctor's "decision to remove petitioner from his prescribed hepatitis C medication was 'endangering [his] life,'" that the "medication was withheld 'shortly after' [the plaintiff] had commenced a treatment program that would take one year," that the plaintiff "was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment." 127 S. Ct. at 2200 (citation omitted). Respondent's allegations against petitioners here are wholly lacking in such factual details.

plained, Attorney General Edward Levi—who held the office for 24 months—was confronted by a

> mass of litigation that sought to obtain money judgments from [him] in his individual capacity. At the time he completed his service as Attorney General at the end of the Ford Administration, there were just over 30 suits then pending against him in his individual capacity. They all needed attention * * * . It took about eight more years before the last of them was cleaned up. No judgment was ever entered against [him] personally; no case reached a stage where he was required to testify * * * . What he did have was this long aggravation so undeserved.

Bennett Boskey, ed., *Some Joys of Lawyering* 114 (2007). Individual-capacity claims against high-ranking government officials have not become less prevalent or burdensome since Attorney General Levi's tenure.

As Judge Cabranes noted, "a detached observer may wonder whether the balance struck [by the court of appeals] between the need to deter unlawful conduct and the dangers of exposing public officials to burdensome litigation * * * jeopardizes the important policy interest Justice Stevens aptly described as 'a national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.'" Pet. App. 70a (quoting *Mitchell*, 472 U.S. at 511 (concurring in the judgment)) (second alteration by Judge Cabranes). Judge Cabranes believed that he was constrained to reach that unsettling result under the court's interpretation of this Court's precedents, which he found to be "less than crystal clear," and which he urged this Court to revisit "at the earliest opportu-

nity." *Id.* at 68a. This Court should clarify its case law in this critically important area and hold that, based on the conclusory allegations made against petitioners in this case, the balance is properly struck in favor of the interests underlying the qualified-immunity doctrine.

II. HIGH-RANKING FEDERAL OFFICIALS MAY NOT BE HELD LIABLE UNDER *BIVENS* BASED SOLELY ON A CONSTRUCTIVE-NOTICE THEORY

The courts of appeals' decision in this case is erroneous for an alternative and perhaps even more fundamental reason. Because of the absence of any factual allegations plausibly suggesting petitioners' involvement in the alleged actions of lower-level officers who purportedly violated respondent's rights, the only way in which this action could proceed against petitioners is on a theory of constructive notice or supervisory liability that is incompatible with *Bivens* and this Court's precedents.

A. This Court Has Limited The Scope Of *Bivens* Remedies

This Court held in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that the Constitution vests federal courts with authority to recognize an implied cause of action for damages against federal officials who have deliberately engaged in unconstitutional conduct. The Court has described the purpose of the *Bivens* damages remedy as twofold: first, to provide victims of constitutional violations with relief in circumstances where there are no other effective remedies; second, to deter individual officers from committing constitutional violations. See *Davis* v. *Passman*, 442 U.S. 228, 245-246 (1979); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 71 (2001).

Although this Court has referred to *Bivens* as "the federal analog to suits brought against state officials

under" Section 1983, *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006), determining the scope of the constitutional *Bivens* remedy is necessarily different from determining the scope of Section 1983. The latter is primarily an exercise in statutory interpretation, while the former requires the Court to make a policy determination traditionally reserved to a legislature. See *Bush* v. *Lucas*, 462 U.S. 367, 376 (1983); see also *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2597 (2007).

Thus, this Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). And the Court has stressed that, before "'authorizing a new kind of federal litigation'" under *Bivens*, the Court should consider whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages" or whether there are "'any special factors counselling hesitation.'" *Wilkie*, 127 S. Ct. at 2598 (quoting *Bush*, 462 U.S. at 378); see *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008) ("Concerns with the judicial creation of a private cause of action counsel against its expansion.").

Because *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers" and not with "deterring the conduct of a policymaking entity," *Correctional Servs. Corp.*, 534 U.S. at 71, this Court has repeatedly refused to extend its judge-made remedy to suits against anyone other than the individual officers responsible for the alleged constitutional violation. In *FDIC* v. *Meyer*, 510 U.S. 471 (1994), the Court categorically barred *Bivens* suits against federal agencies—even where they are otherwise amenable to suit because Con-

gress has waived sovereign immunity. *Id.* at 484. It emphasized that "the logic of *Bivens*" contemplates only a limited action against individuals, not against federal agencies. *Id.* at 484-485. Similarly, in *Correctional Services*, the Court held that *Bivens* suits could not be brought against private entities. See 534 U.S. at 66-74.

B. Any Supervisory Liability Permitted Under *Bivens* Must Be Strictly Limited

1. As explained above, the cause of action in *Bivens* was inferred to provide a limited remedy against the individuals directly responsible for a constitutional deprivation. The logic of *Bivens* thus permits high-level federal officials to be held liable only for their direct involvement in constitutional violations, or (at most) their deliberate indifference in the face of information that the rights of others are being violated. That understanding is consistent with the long-standing principle that a government official may be held liable only for his own culpable actions, and not under a theory of *respondeat superior* or vicarious liability. See *Dunlop* v. *Munroe*, 11 U.S. (7 Cranch) 242, 269 (1812); see also *Robertson* v. *Sichel*, 127 U.S. 507, 515-516 (1888) ("A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties.").

The Second Circuit has adopted a far broader standard for supervisory liability that, as applied here, expands the *Bivens* remedy well beyond its necessarily limited scope. The Second Circuit's standard permits a supervisor to be held personally liable under Section 1983 or *Bivens* not only for the supervisor's direct par-

ticipation in constitutional violations or deliberate indifference to knowledge of wrongdoing, but also for merely constructive knowledge of a risk of wrongdoing by subordinate officers. See Pet. App. 14a (holding that a supervisor may be liable for "creat[ing] a policy or custom under which the violation occurred," or being "grossly negligent in supervising subordinates who committed the violation"); accord, *e.g.*, *Poe* v. *Leonard*, 282 F.3d 123, 141-142 (2d Cir. 2002); *Black* v. *Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996); *Meriwether* v. *Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989); *McKinnon* v. *Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978).[8] Thus, the court of appeals held here that the Attorney General and the FBI Director could be held liable without any allegations that could support a finding of actual knowledge of or even deliberate indifference to unconstitutional conduct by subordinates.

That broad notion of supervisory liability would expand the *Bivens* remedy far beyond its intended purposes. Imposing liability on a supervisory official who lacks actual knowledge of wrongdoing is an ineffective

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[8] The court of appeals' extension of liability to situations where a supervisory official "created a policy or custom under which the violation occurred" (Pet. App. 14a) is uncertain in scope. It arguably extends liability to supervisors who create a policy or custom that is consistent with the Constitution, if it is applied in an unconstitutional manner by some at the operational level of government. Such a rule would extend supervisory liability far beyond situations where a custom and practice has become "so permanent and well settled" as to have the force of law. *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690-691 (1978) (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 168 (1970)). The Second Circuit has, however, recognized that, in order to overcome a supervisor's qualified immunity, a plaintiff must show that both "the law violated by [the subordinate] and the supervisory liability doctrine * * * were clearly established." *Poe*, 282 F.3d at 134.

means of deterring official misconduct by subordinates. The "core premise" of *Bivens* is "the deterrence of individual officers who commit unconstitutional acts." *Correctional Servs. Corp.*, 534 U.S. at 71. As this Court recognized, the purposes of *Bivens* are fulfilled by deterring those who are directly responsible for the unconstitutional conduct, even if expanding liability further might discourage harm. See *ibid*. Moreover, *Bivens* has never been intended to function as a management tool to weed out negligent supervisors.

Furthermore, there are special factors counselling hesitation against extending *Bivens* to impose supervisory liability. It would take little effort for a plaintiff to subject high-level government supervisors—including even Cabinet-level officials and heads of agencies—to time-consuming lawsuits by making bare allegations of constructive knowledge based solely on supervisory authority and without supporting facts. Officials like the Attorney General and the Director of the FBI have ultimate supervisory authority over thousands of subordinates in numerous components through multiple levels of bureaucracy—deputies, assistants, bureau chiefs, office heads, and so on. At the time of respondent's detention, the Department of Justice included the litigating divisions and United States Attorneys offices, the FBI, the Drug Enforcement Administration, the Immigration and Naturalization Service, the United States Marshal's Service, the United States Trustees, the Bureau of Prisons, and others. Plainly, it is impossible for high-ranking officials to examine every operational decision made at every level of bureaucracy. Cf. *Parish* v. *United States*, 100 U.S. 500, 504 (1879). Thus, under any sensible scheme, supervisory officials must be permitted to rely on the good judgment of their subordinates.

Just as this Court accords a general presumption of regularity to actions of government officials, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), so too should supervisors be able to presume their subordinates act in accordance with law. The presumption of regularity specifically applies in judicial review of the exercise of supervisory responsibility by high-level government officials. "[I]n the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties." *Chemical Found.*, 272 U.S. at 14-15. This Court has been especially reluctant to "lightly discard" the presumption that there is a legitimate basis for government action where there is a risk of "judicial intrusion into executive discretion of [a] high order." *Hartman*, 547 U.S. at 263. The actions taken by the heads of the largest federal law-enforcement agencies in response to a coordinated terrorist attack on American soil undoubtedly reflect executive discretion of a very high order.

Finally, requiring high-level officials to face personal liability based on merely constructive knowledge of wrongdoing at the operational level would almost certainly "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.), cert. denied, 339 U.S. 949 (1950). Exposing such high-level government officials to liability based on the constitutional violations of lower-level agency employees would greatly exacerbate the "substantial social costs" of extending liability to supervisory government officials, "including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987).

2. In the context of Section 1983 suits, this Court has already foreclosed the imposition of Section 1983 liability on individual government officials on the basis that they had "constructive notice" of wrongdoing committed by third parties. See *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Although Section 1983 and *Bivens* differ in their substantive scope,[9] there is no reason for this Court to reach any different conclusion under *Bivens*. Indeed, because of the special considerations counselling reluctance in expanding the judge-made *Bivens* remedy, the limitation of liability that the Court has adopted for Section 1983 should apply *a fortiori* to *Bivens* cases.

In *Rizzo*, the Court reversed a grant of injunctive relief under Section 1983 against the mayor, the city manager, the police commissioner, and other police supervisors in Philadelphia. It concluded that there could be no supervisory liability under Section 1983 when "unconstitutional exercises of police power" had been committed by individual police officers rather than their supervisors and "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisors]—express or otherwise—showing their authorization or approval of such misconduct." 423 U.S. at 371, 377. Although administrators may be liable when they deny rights "by their *own* conduct," that was not

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[9] While this Court has generally treated immunity under Section 1983 and *Bivens* in parallel, see, *e.g.*, *Harlow*, 457 U.S. at 818 n.30 (quoting *Butz*, 438 U.S. at 504), it has also recognized that the substantive scope of suits under those provisions may differ in some respects. Thus, for example, while municipalities that employ persons who commit constitutional violations may be held liable under Section 1983, see *Monell*, 436 U.S. at 690-691, *Bivens* actions against federal agencies are categorically barred, see *FDIC* v. *Meyer*, 510 U.S. at 485.

the case in *Rizzo*, the Court held, because "the responsible authorities had played no affirmative part" in violating constitutional rights. *Id.* at 377.

The general restraint that this Court traditionally exercises in interpreting the scope of the *Bivens* cause of action (see, *e.g.*, *Wilkie*, *supra*) calls at a minimum for adopting a standard of secondary liability that is at least as rigorous as the one that this Court has long applied in the Section 1983 context. And, indeed, in *Farmer* v. *Brennan*, 511 U.S. 825 (1994), the Court held that a supervisory-level prison official can be held liable for dangerous prison conditions alleged to violate the Eighth Amendment only if the supervisor "knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837-838. In adopting that requirement of subjective knowledge as the predicate for "deliberate indifference," the Court distinguished individual defendants from corporate municipalities, for which an objective standard of knowledge is more appropriate. See *id.* at 841-842.

The Court has also followed a liability-limiting approach in Section 1983 actions against municipalities. There, the Court has held that liability attaches only "when it can be fairly said that the city itself is the wrongdoer," *Collins* v. *City of Harker Heights*, 503 U.S. 115, 122 (1992), and not based on a theory of *respondeat superior* or vicarious liability. See *City of Canton* v. *Harris*, 489 U.S. 378, 386-387 (1989). Where a plaintiff seeks to hold a municipality liable for constitutional torts committed by its agents, the plaintiff must "demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Board of the County Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997); see also *id.* at 405 (explaining that "rigorous standards of culpability and causation must be applied").

Liability may not be imposed based on "simple or even heightened negligence," but instead requires a showing that the municipality itself manifested "deliberate indifference to the risk that a violation of a particular constitutional or statutory right" might occur. *Id.* at 407, 411. The plaintiff must also establish "a direct causal link" between the municipality's culpable conduct "and the alleged constitutional deprivation." *Harris*, 489 U.S. at 385.

There is no reason to treat high-level federal officials like the Attorney General or the Director of the FBI sued in their personal capacity under *Bivens* any less favorably than a municipality sued under Section 1983. In both instances, the rationale for imposing liability is similar, as is the rule that liability must be predicated on the defendant's own culpable conduct rather than vicarious liability or *respondeat superior*.

C. The Court Of Appeals Erred In Permitting This Suit To Proceed Against Petitioners Based On Allegations Amounting To No More Than Constructive Notice

As applied to the allegations in this case, the proper standard for supervisory liability would preclude liability unless petitioners had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being "of high interest" and they were deliberately indifferent to that discrimination. See *Farmer*, 511 U.S. at 837-838; *Brown*, 520 U.S. at 414. Respondent's allegations plainly could not meet that standard, as the complaint is completely devoid of any non-conclusory factual allegation suggesting that petitioners knew about the allegedly discriminatory acts of lower-

level FBI officials.[10] Furthermore, respondent's factual allegations do not show any causal relationship between any of petitioners' own conduct and respondent's designation as a detainee "of high interest."

As explained above, respondent's allegations do not suggest petitioners' personal involvement in any discriminatory decision. Respondent likewise makes no factual allegations suggesting petitioners knew about any discriminatory decisions made by subordinates: There is no allegation that either petitioner had any communications with the lower-level officials who allegedly made the classification at issue (Rolince and Maxwell), or that petitioners knew of any particular activities taken by the other defendants as to respondent.

Nevertheless, despite the total lack of any nonconclusory factual allegation supporting the personal and direct involvement of petitioners in any discriminatory action, the court of appeals reasoned that petitioners could be held personally responsible "for the actions of their subordinates under the standards of supervisory liability outlined" in the court's opinion. Pet. App. 62a;

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[10] Respondent contended at the certiorari stage (Br. in Opp. 24, 25) that the question of constructive knowledge "has not yet arisen" in this case because his "allegation that petitioners had actual knowledge of their subordinates' unconstitutional conduct is accepted as true" at the pleading stage. If the Court concludes (as it should) that respondent's conclusory allegations of petitioners' actual knowledge are inadequate, without any supporting factual matter, to entitle him to proceed to discovery, then his only other apparent ground for proceeding against petitioners under the reasoning of the court of appeals would be by virtue of constructive knowledge inferred from "the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." Pet. App. 62a.

see also *id.* at 14a-15a (holding that supervisor may be held liable for creating a custom or policy under which a violation takes place or for gross negligence in supervising subordinates who commit constitutional violations). That error alone provides a sufficient basis for reversing the decision below and instructing that the claims against petitioners be dismissed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the remaining claims against petitioners.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
JONATHAN F. COHN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT M. LOEB
SARANG VIJAY DAMLE
Attorneys

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DENNIS HASTY AS RESPONDENT SUPPORTING PETITIONERS

MICHAEL L. MARTINEZ *
DAVID E. BELL
MATTHEW F. SCARLATO
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

* Counsel of Record

Counsel for Respondent Dennis Hasty

August 29, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTIONS PRESENTED

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, six individuals were parties in the Court of Appeals. Each was a defendant in the district court and an appellant in the Court of Appeals. They are Dennis Hasty, former Warden of the Metropolitan Detention Center; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons; David Rardin, former Director of the Northeast Region of the Federal Bureau of Prisons; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons; and Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation.

Hasty filed a petition for certiorari in No. 07-827, and Cooksey, Rardin, and Hawk Sawyer filed a petition for certiorari in No. 07-1150, both of which are pending.

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IN THE

Supreme Court of the United States

No. 07-1015

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DENNIS HASTY AS RESPONDENT SUPPORTING PETITIONERS

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at *Iqbal v. Hasty*, 490 F.3d 143 (2007) (reprinted in the appendix to petitioners' petition for a writ of certiorari ("App.") 1a-70a). The order of the district court dismissing some, but not all, of the claims is unreported, but is available as *Elmaghraby v. Ashcroft*, 04-CV-1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (App. 71a-150a).

JURISDICTION

The Court of Appeals entered its opinion and judgment on June 14, 2007 and denied rehearing on September 18, 2007 (App. 151a-152a). On December 7, 2007, Justice Ginsburg extended the petitioners' time within which to file a petition for a writ of certiorari to January 16, 2008. On January 4, 2008, Justice Ginsburg further extended that time to February 6, 2008, and the petitioners' petition was filed on that date. The petition was granted on June 16, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Although Dennis Hasty, as a respondent in support of petitioners Ashcroft and Mueller, agrees with the statement of the case as framed by petitioners, we briefly summarize the case in order to put the matter into context as to respondent Hasty. Following the terrorist attacks of September 11, 2001, "Congress passed a resolution authorizing the President to 'use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States . . . .'" *Hamdi v. Rumsfeld,* 542 U.S. 507, 510 (2004) (quoting Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)). As a result of this enactment, then-Attorney General Ashcroft issued a Directive for federal law enforcement officials "to use 'every available law enforcement tool' to arrest persons who 'participate in, or lend support to, terrorist activities.'" *See* Report of the Office of Inspector General entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks"

("OIG Report") at 1, available at http://www.fas.org/irp/agency/doj/oig/detainees.pdf.

In the course of executing that order, federal officials arrested and detained over 700 aliens for violating immigration laws, approximately 60 percent of whom were arrested in the New York City area. *Id.* at 111. Many of those arrested in the New York area "and deemed by the FBI to be of 'high interest' to its terrorism investigation" were sent to the Metropolitan Detention Center ("MDC") in Brooklyn, New York, where respondent Hasty was warden, until their status could be assessed. *Id.* Among those arrested was respondent Javaid Iqbal, a citizen of Pakistan. Iqbal asserts that he was arrested and detained on November 2, 2001 by agents of the Immigration and Naturalization Service ("INS") and the Federal Bureau of Investigation ("FBI"). He asserts further that he was held at the MDC until his deportation on or about January 15, 2003. *See* First Amended Complaint ("Compl.") at ¶¶ 9, 80; App. 157a, 169a. Iqbal does not deny that he was in the United States in violation of federal law.

Because the FBI determined who would go to the MDC but provided little information about the detainees including what specific threats they posed, the Bureau of Prisons' ("BOP") headquarters decided early on, for security reasons, to impose special conditions on the detainees. For example, they were housed in the Administrative Maximum ("ADMAX") Special Housing Unit ("SHU") at the MDC, *see* OIG Report at 19, and initially were subject to restrictive conditions of confinement, such as "lockdown" for 23 hours a day and restrictive escort procedures for movements outside the ADMAX SHU. *Id.* at 112.

Iqbal alleges that he was housed in the ADMAX SHU from January 8, 2002, until he was released into the MDC's general population six months later in July 2002. Compl. ¶¶ 9, 81; App. 157a, 169a. Among other things, he claims that while in the ADMAX SHU he was subjected to a variety of abuses that purportedly violated a number of his constitutional and statutory rights. Among the various individuals Iqbal sued was respondent Hasty, then the warden of the MDC. Each allegation regarding Hasty's "personal involvement," as with most other supervisors sued, consists of nothing more than boilerplate language such as Hasty "knew or should have known" about some alleged constitutional or statutory violation without any specific factual allegations. *See, e.g., id.* at ¶¶ 124-25; App. 177-78a.

SUMMARY OF ARGUMENT

This case involves the intersection of two important areas of federal civil litigation and this Court's jurisprudence: pleading standards and the qualified immunity doctrine. The core issue here is whether a plaintiff can overcome a federal supervisory official's entitlement to qualified immunity at the pleadings stage with a complaint void of any factual allegations asserting the supervisory official's involvement in the alleged constitutional violations, but relies entirely on mere conclusions and labels to assert his or her involvement.

The Second Circuit held that Iqbal's boilerplate allegations concerning the personal involvement of numerous federal supervisory officials, including Hasty, were sufficient to defeat qualified immunity and allow the case to proceed to discovery. The decision, however, is contrary to both this Court's well

established guidance on qualified immunity, *see, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Crawford-El v. Britton*, 523 U.S. 574 (1998), and the Court's more recent guidance in *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955 (2007), concerning the standard for assessing whether a complaint sufficiently satisfies the pleading standard under Rule 8 of the Federal Rules of Civil Procedure. The Second Circuit itself recognized the inherent tension in its ruling, given the intersecting principles of qualified immunity, the *Twombly* decision, and Rule 8. Yet the Second Circuit denied qualified immunity and permitted the case to survive as to those federal supervisory officials who had appealed, despite the absence of any alleged facts demonstrating Iqbal's entitlement to relief against the supervisory officials. That decision was incorrect and should be reversed.

Because the fundamental flaw of the Second Circuit's ruling is that it essentially ignored the very essence of Rule 8, particularly as explained in *Twombly* – *i.e.*, that a pleading must put forth facts that plausibly demonstrate that a claimant is entitled to relief – resolution of the questions posed by petitioners Ashcroft and Mueller here should not be limited only to cabinet officers or other "high-level" agency heads. Rather, the result should be applicable to any federal supervisory official who exercises significant discretionary responsibilities – such as the warden of a large correctional facility housing hundreds of inmates and detainees. In other words, it should be a generally applicable rule of pleading that claimants proceeding against federal supervisory officials in their individual capacity must supply some level of factual allegations demonstrating the

supervisory officials' involvement and cannot simply rely on conclusory labels.

Relatedly, as petitioners Ashcroft and Mueller urge, this Court should reverse the Second Circuit's acceptance of a constructive knowledge theory of liability that permits claims against supervisory officials based on their alleged gross negligence in supervising alleged lower-level perpetrators. Such a standard violates prior guidance from this Court – including *Rizzo v. Goode*, 423 U.S. 362 (1976) – in that it fails to premise liability on causal connections between affirmative conduct of supervisory officials and the harm alleged, allowing a supervisor to be held liable without any actual knowledge of the acts giving rise to a claim. A qualified immunity motion should not be defeated merely because a plaintiff alleges, without facts, that due to the defendant's supervisory position he or she "knew or should have known" of the alleged unconstitutional actions of subordinates.

ARGUMENT

I. A *BIVENS* PLAINTIFF SHOULD NOT BE ABLE TO DEFEAT A FEDERAL SUPERVISORY OFFICIAL'S CLAIM TO QUALIFIED IMMUNITY BASED ON CONCLUSORY ALLEGATIONS. RATHER, THE PLAINTIFF MUST ASSERT SPECIFIC FACTS DEMONSTRATING THE OFFICIAL'S INVOLVEMENT IN THE ALLEGED VIOLATIONS.

A. This Court Has Long Sought To Preserve a Federal Official's Right to Qualified Immunity By Fashioning Special Rules Applicable to *Bivens* Cases Intended to Resolve Meritless Cases At the Earliest Possible Stage In Litigation.

Iqbal's Complaint alleges a right to civil damages under this Court's *Bivens*[1] jurisprudence against a large number of federal officials, ranging from the lowest-level correctional officers to those at the highest level of the Executive Branch. While this Court has recognized an individual's right to bring certain civil constitutional claims against federal officials in their individual capacity, it has set definite boundaries to contain them, repeatedly expressing concern about the considerable burden and distraction *Bivens* cases pose to government officials attempting to perform their official responsibilities. *See, e.g., Harlow*, 457 U.S. at 816-18; *Crawford-El*, 523 U.S. at 584-85; *Mitchell*, 472 U.S. at 526. Hence, this Court has carefully constructed the qualified

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

immunity doctrine, which ensures the proper "balance between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quotation omitted); *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("the qualified immunity doctrine embodies special federal policy concerns related to the imposition of damages liability upon persons holding public office . . .").

The "essence" of qualified immunity is its possessor's "entitlement not to have to stand trial or face the other burdens of litigation," *Mitchell,* 472 U.S. at 526, including the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow,* 457 U.S. at 817; *Anderson*, 483 U.S. at 646, n.6. In constructing the boundaries of qualified immunity, therefore, this Court has long recognized that courts must protect federal officials from unwarranted claims with a vigorous application of qualified immunity "at the *earliest possible stage* in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (emphasis added); *see also Scott v. Harris*, ___ U.S. ___, 127 S. Ct. 1769, 1774, n.2 (2007); *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). Indeed, because qualified immunity is "*an immunity from suit* rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original); *see also Siegert v. Gilley*, 500 U.S. 226, 233 (1991).

Acknowledging the critical policy objectives behind this unique defense to civil claims, this Court has excepted established civil procedures to bestow special rights on defendants in *Bivens* cases. For example, in *Mitchell*, 472 U.S. 511, 530, and as later

reaffirmed in *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996), this Court held that – unlike defendants in an ordinary civil action – government officials are entitled to an immediate interlocutory appeal of a federal district court's denial of a qualified immunity motion as a matter of law (a rule that permitted this Court's jurisdiction over the instant petition). Similarly, discovery is often stayed or limited while the immunity question is resolved, or after initial dispositive motions are properly defeated, discovery is narrowly tailored to issues relating to the defendant's entitlement to qualified immunity. *See Anderson*, 483 U.S. at 646 n.6; *Mitchell*, 472 U.S. at 526.

Because frivolous suits are a prevalent occurrence and present a particular concern in the *Bivens* context, disposing of unmeritorious cases at the pleading stage is essential to the preservation of qualified immunity. *See Crawford-El*, 523 U.S. at 590 ("there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated."). This Court has previously recognized the potential conflict between qualified immunity and liberal pleading rules, and has therefore sought to protect government officials from baseless suits by requiring plaintiffs to "put forward specific, nonconclusory factual allegations." *Id.* at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)). This requirement enables courts to "weed out" cases lacking merit from those with potential merit, which preserves the critical balance this Court has established in decades of *Bivens* jurisprudence. *Id.* at 593, 598; *see also Anderson*, 483 U.S. at 640 n.2 (emphasizing "that 'insubstantial claims' against government officials [should] be re-

solved *prior* to discovery") (emphasis added) (quoting *Harlow*, 457 U.S. at 818).

Nowhere is the problem of allowing baseless *Bivens* suits to proceed to discovery, and possibly trial, more apparent than in this case. Iqbal seeks to impute liability to various supervisory officials – including those at the highest levels of government – for alleged violations occurring in connection with the U.S. Government's response to the deadliest attack ever committed on U.S. soil. Iqbal's claims use the tool of individual liability suits to attack the validity of the federal government's decisions in handling emergency situations affecting this country's national security. Yet there is an obvious "national interest in enabling Cabinet officers . . . to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in judgment).

This concern runs to all supervisory officials, including to Hasty, the warden of a large detention facility. Indeed, although this Court has granted only Ashcroft and Mueller's petition for a writ of certiorari, it should deem the preservation of Hasty's entitlement to qualified immunity of no less import. While Hasty did not have the lofty level of authority that petitioners possessed, he stood in a position that is more visible day-to-day to potential claimants – *i.e.*, prisoners – and this visibility provides a fertile ground for Hasty to be subjected to baseless lawsuits.[2] Thus, to the extent this Court holds that

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[2] Indeed, our government has long been concerned with the problems of burdensome and frivolous prisoner lawsuits. *See, e.g., Woodford v. Ngo*, 548 U.S. 81, 117 (2006) ("The competing values that Congress sought to effectuate by enacting the [Prison Litigation Reform Act] were reducing the number of

petitioners are entitled to qualified immunity here, it should fashion a rule that protects warden Hasty as well. Otherwise, the Court is opening the door for all inmates or detainees to sue their wardens individually simply by throwing conclusory catch-phrases into their complaints about their warden being complicit in alleged violations of low-ranking prison officers. Not only could this result interfere with a warden's ability to manage an institution, but it could run afoul of another "social cost" of *Bivens* action – "the deterrence of able citizens from acceptance of public office." *See Crawford-El*, 523 U.S. at 590 n.12 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). Although the fear of being subjected to the burdens of litigation might or might not deter one from taking a high-ranking Cabinet office position, it is certainly a harsh reality of accepting public office for wardens such as Hasty.

The questions presented in this appeal, therefore, represent the next natural progression of this Court's chain of jurisprudence seeking to preserve the integrity of the qualified immunity doctrine. Demanding specific factual allegations from plaintiffs to avoid a claim of qualified immunity filed by supervisory officials will, as this Court recognized in *Crawford-El*, best serve this interest. *See Crawford-El*, 523 U.S. at

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frivolous filings, on one hand, while preserving prisoners' capacity to file meritorious claims."); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 365 (7th Cir. 1983) ("Much has recently been said and written about the proliferation of frivolous lawsuits filed by state and federal prisoners."). Moreover, a cursory review of the federal case dockets in New York reveals that in the less than five years that Hasty served as warden of the MDC and another institution in New York City, he was named as a defendant in almost 100 civil actions.

598; *Anderson*, 483 U.S. at 640 n.2; *Harlow*, 457 U.S. at 818.

B. *Twombly* Requires That A Complaint Allege Facts, Not Legal Conclusions, Demonstrating That The Plaintiff's Claim For Relief Is Plausible.

Last term, this Court affirmed the long-standing principle that a plaintiff needs to allege facts demonstrating a right to relief in a different yet analogous context. In *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955 (2007), this Court considered the application of Rule 8(a)(2) of the Federal Rules of Civil Procedure in the context of an antitrust conspiracy case brought under Section 1 of the Sherman Act ("Section 1"), 15 U.S.C. § 1 (2008). The complaint in *Twombly* premised a Section 1 conspiracy claim on allegations that the defendants engaged in parallel conduct, which this Court observed were "consistent" with plaintiffs' theory for relief, but "without some further factual enhancement[,] it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* at 1966 (citing *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)).

Despite this flaw, the plaintiffs in *Twombly* argued that the complaint satisfied minimum notice pleading standard as stated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," 127 S. Ct. at 1969, which was a formulation relied upon by lower federal courts for decades. *See, e.g., id.* at 1978 (Stevens, J., dissenting). In consid-

ering *Conley's* standard and the fifty years of jurisprudence and scholarly analysis that it generated, this Court rejected *Conley* as the applicable pleading standard under Rule 8. *Id.* at 1968-69. It observed that under a "literal" reading of the *Conley* formulation, a complaint could only be dismissed if its allegations render the claim for relief a "factual impossibility." *Id.* at 1968. Hence, the Court "retire[d]" the *Conley* standard, determining that Rule 8(a)(2) requires more. *See id.* at 1968-69.

In *Conley's* place, this Court held that Rule 8(a)(2)'s mandate establishes a "plausibility" standard for judging the adequacy of complaints. *Id.* at 1970. As explained by this Court, Rule 8(a)(2) requires a complaint to make a "showing" of a plaintiff's entitlement to relief, which must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 1964 (quoting *Conley*, 355 U.S. at 47). To meet this burden, this Court found that a complaint must pass two threshold hurdles before discovery is allowed. First, while a complaint need not contain "detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Second, these factual allegations must "raise a right to relief above the speculative level" that crosses the line "between possibility and plausibility of 'entitl[ement] to relief.'" *Id.* at 1965-66. In other words, to "enter the realm of plausible liability," this Court determined that allegations in a complaint must cross the "border" between both "the conclusory and the factual . . .[and] the factually neutral and the factually suggestive." *Id.* at 1966 n.5. In reaching

this interpretation of Rule 8, this Court repeatedly affirmed that it was not applying a "'heightened' pleading standard." *Id.* at 1973 n.14.

This Court's holding in *Twombly* was guided in part by concerns that discovery in antitrust cases is often burdensome and costly, which – similar to *Bivens* cases – opens the door to abuses by plaintiffs. *Id.* at 1967. Thus, it observed that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' . . . ." *Id.* at 1967 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). In applying this standard, this Court rejected the plaintiffs' reliance on allegations concerning the defendants' parallel conduct because, standing alone, these allegations were equally consistent with the conspiracy alleged as with independent conduct, and therefore failed to "plausibly suggest[]" that a Section 1 conspiracy existed. *Id.*

C. The Teachings Of *Twombly* Underscore The Need For Specific Factual Allegations In *Bivens* Complaints.

Read together, *Twombly* and this Court's qualified immunity jurisprudence make clear that a plaintiff must allege specific facts demonstrating a plausible right to relief against a defendant. Akin to the Court's admonitions concerning the potential for discovery abuse in complex antitrust cases, *see Twombly*, 127 S. Ct. at 1967, *Bivens* cases present an even greater danger: not simply to burden private interests, but to impinge on the essential functions of governance, including, as exists in this case, the fed-

eral government's ability to ensure the security of our nation, and its ability to find qualified individuals willing to assume these roles in government without fear of risking their financial futures on unfounded litigation. As the Tenth Circuit has rightly observed, *Bivens* cases – and their "analog" under 42 U.S.C. § 1983, *see Hartman v. Moore*, 547 U.S. 250, 255 n.2 (2006) – "pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants." *Robbins v. State of Okla.*, 519 F.3d 1242, 1249 (10th Cir. 2008) (quoting *Anderson*, 384 U.S. at 646 n.6)). And because *Twombly*'s plausibility standard "appropriately reflect[s] the special interest in resolving the affirmative defense of qualified immunity 'at the earliest possible stage of a litigation,'" it has "greater bite" in these cases. *Id.* Indeed, "[w]ithout allegations sufficient to make clear the 'grounds' on which the plaintiff is entitled to relief, *Twombly*, 127 S. Ct. at 1965 n.3, it would be impossible for the court to perform its function of determining, at an early stage in the litigation, whether the asserted claim is clearly established."[3] *Id.*; *see also Behrens*, 516 U.S. at 309 ("at [the pleading] stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.'") (emphasis in original).

Hasty has repeatedly asserted that he has not advocated for a "heightened" pleading standard in this case. Rather, in light of the Court's qualified immunity jurisprudence and the more recent *Twombly*

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[3] Moreover, any doubt that *Twombly* applies in a *Bivens* case should be laid to rest by the fact that this Court cited *Twombly* in a subsequent decision when it considered the sufficiency of a complaint brought under 42 U.S.C. § 1983, in *Erickson v. Pardus*, ___ U.S. ___, 127 S. Ct. 2197, 2200 (2007).

decision, this Court should hold that a *Bivens* plaintiff must provide some factual specificity in a complaint as to each defendant to withstand a qualified immunity motion. Factual specificity in this context does not equate to a heightened pleading standard. Rather, it is entirely consistent with Rule 8 to require factual allegations – not labels and conclusions – demonstrating that the claimant is entitled to relief. *Twombly* affirms that conclusion.

Furthermore, this rule is particularly important when the defendants are supervisory officials who hold more sensitive positions in the government and the scope of their authority exposes them to a wide range of lawsuits. Plaintiffs such as Iqbal should be required to allege a plausible – and not simply possible – factual basis to demonstrate a *Bivens* plaintiff's right to relief against each particular defendant from whom he seeks relief. Without such a rule, *Bivens* plaintiffs will be able to bring civil claims against high-ranking federal officials with reckless abandon. *See Iqbal*, 490 F.3d at 179; App. 69-70a (Cabranes, J., concurring) ("it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit . . .").

D. The Second Circuit Misapplied *Twombly's* Plausibility Standard.

Although the Second Circuit carefully considered the foregoing precedents of this Court, its analysis of the applicable pleading standard in *Bivens* cases was only half right. In considering what it deemed as "conflicting signals" in *Twombly*, the Court of Appeals rightly decided that the "essential message" of

Twombly is that courts should apply "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *See Iqbal*, 490 F.3d at 157-58 (2d Cir. 2007) (emphasis in original); App. 24-25a. In reaching this conclusion, the Second Circuit strained to adhere not only to *Twombly* but this Court's prior edicts concerning the application of qualified immunity. *See id.*

But the Second Circuit missed the mark in its application of the *Twombly* standard to the allegations in Iqbal's Complaint. Its ruling permits this case to proceed to discovery against Ashcroft, Mueller, Hasty, and other supervisory officials despite Iqbal's reliance on exactly the type of conclusory allegations decried in *Twombly* and *Crawford-El*. Petitioners' Brief amply demonstrates the fatal flaws in Iqbal's claims against these cabinet-level officials, and the same basic analysis of Iqbal's claims applies to Hasty as well. Iqbal's claims against Hasty are of the same conclusory nature as those against Ashcroft and Mueller, premised entirely on the hypothesis that these federal officials must have been involved in the harms allegedly committed against Iqbal due to their position in the chain of command of the Executive Branch.

For example, as to Iqbal's claim that Hasty and other supervisory officials were complicit in acts of excessive force committed by low-level correctional officers at the MDC, he simply alleges:

> The beatings of Iqbal by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to

> Defendants Hasty [and four other supervisory officials at the MDC], who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

Compl. ¶ 124; App. 177a. The Second Circuit held these allegations sufficient, finding that "[t]he plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of Hasty's knowledge because it is at least plausible that a warden would know of mistreatment inflicted by those under his command." *Iqbal*, 490 F.3d at 170; App. 50a.

This holding, however, reflects a misunderstanding of *Twombly's* teachings. First, these allegations run afoul of the *Twombly* standard because they are nothing but a boilerplate recital of the operative legal standard for supervisory liability as established by the Second Circuit.[4] *See Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986) ("[a] supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue."). Second, Iqbal's allegations as to Hasty fail adequately to suggest that he was involved in the violations at issue. The error in the Second Circuit's analysis here is best exemplified by its statement that "it is at least plausible" that Hasty would know of the acts at issue,

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[4] This error is even more pronounced due to the fact, as explained in Section II, *infra*, that the Second Circuit's standard for supervisory liability is too permissive in light of prior rulings of this Court.

Iqbal, 490 F.3d at 170; App. 50a, because this finding moves the minimum pleading standard back to the realm of possibility – *i.e.*, that Iqbal's claim is not a "factual impossibility." *See Twombly*, 127 S. Ct. at 1968. As Warden of the MDC, certainly it is *possible* or *conceivable* to believe Iqbal's claim that Hasty could have established customs or policies that led to the violations alleged, or that he could have known about the acts that occurred and failed to act on such knowledge. But *Twombly* requires more; it requires *plausibility*. And Iqbal fails to "identify[] any facts that are suggestive enough to render [this claim] plausible" as to Hasty.[5] *Id.* at 1965. Thus, the Second Circuit – despite its careful analysis of *Twombly* – transformed the plausibility standard back to *Conley's* more permissive standard that *Twombly* unequivocally rejected. If *Twombly's* standard is to have any meaning, Iqbal's claims should not be allowed to proceed to discovery.

The Second Circuit's approval of Iqbal's allegations concerning an alleged conspiracy under 42 U.S.C. § 1985(3) demonstrates an even more dramatic misapplication of *Twombly*. The Second Circuit deter-

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[5] Lower federal court decisions are replete with examples of facts that provide a plausible basis to hold supervisory officials liable for acts committed by their subordinates. For example, in *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001), the plaintiff alleged specific facts that the supervisory defendants knew that the subordinate who directly committed the unconstitutional act had similarly acted on four prior occasions, and therefore "knowingly exposed" the plaintiff to an employee with a propensity to commit such acts. While decided before *Twombly*, this complaint likely would still pass *Twombly's* scrutiny because these allegations were both non-conclusory and plausibly suggested the supervisory official's culpability in the harms alleged by the plaintiff.

mined that it had "no doubt" that Iqbal's conspiracy allegations were sufficient because "we do not encounter here a bare allegation of conspiracy supported only by an allegation of conduct that is readily explained as individual action . . . ." 490 F.3d at 177; 65a. Like the complaint at issue in *Twombly*, however, Iqbal's conspiracy claim relies entirely on conclusory allegations that somehow the defendants came to an "agreement" to violate Iqbal's rights, and the Complaint fails to provide any meaningful facts that suggest that any such agreement existed. *See* Compl. ¶¶ 96, 247; App. 172a, 206a. The absence of any specifics as to the nature of this theorized conspiracy is directly analogous to *Twombly*, which explicitly held that "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 127 S. Ct. at 1966. It is therefore puzzling how the Second Circuit could distinguish Iqbal's claim from that of *Twombly*, and the Second Circuit fails to explain which of Iqbal's allegations support its conclusion that there is "no doubt" that Iqbal has adequately stated a conspiracy claim. Indeed, a comparison between the conspiracy allegations in *Twombly* and those at issue here readily exposes their fatal flaw.

The same theme rings true for the remainder of Iqbal's claims against Hasty. A full review of Iqbal's 54-page, 270-paragraph Complaint fails to provide adequate grounds for finding Hasty complicit in any of the violations alleged. All of the Complaint's claims directed against Hasty contain similarly hollow assertions such as that Hasty established "customs and practices," that he "knew or should have known" of the violations alleged or the propensity of his subordinates to commit the violations alleged, or that he acted with "deliberate indifference and/or reckless

disregard." *See, e.g.*, Compl. ¶¶ 17, 57-58, 97, 108, 109, 124-25, 134, 142, 148-50, 150, 157, 160-61, 173-75, 195, 197; App. 158a, 165a, 173a, 175a, 177-78a, 180a, 182-85a, 187a, 190-91a. The conclusory nature of these allegations is further exposed by the fact that virtually all of Iqbal's boilerplate allegations that attempt to establish Hasty's personal involvement are lumped together with the alleged "actions" of other supervisory defendants, sometimes numbering as many as *eleven* defendants. *See, e.g.*, Compl. ¶ 96; App. 172a.[6]

In finding these allegations sufficient, the Second Circuit failed to apply properly the teachings of *Twombly* and this Court's qualified immunity jurisprudence, essentially finding that if Iqbal alleged Hasty wrongfully acted, qualified immunity must be denied. Yet on their face, each and every one of these allegations is wholly conclusory and unsupported by facts. Iqbal fails to allege *any* fact concerning the time, place, or manner of Hasty's personal involvement in the alleged violations. *See Twombly*, 127 S. Ct. at 1971 n.10. For example, Iqbal's series of "customs and practices" allegations fail to identify any such policy and practice with any specificity, or even to describe their purported content.[7]

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[6] Furthermore, this case is rare in that the events giving rise to Iqbal's claims have already been subject to an extensive investigation by the OIG that resulted in a detailed report of findings relevant to Iqbal's case. The OIG Report serves only to affirm the conclusion that Hasty was not involved in the events giving rise to Iqbal's claims. Despite its extensive findings, it did not make any findings that Hasty had any culpability in the types of abuses alleged by Iqbal.

[7] By contrast, Iqbal *does* make a specific factual allegation against Hasty's successor as Warden of the MDC, Michael Zenk,

Thus, a proper analysis of Iqbal's claims against Hasty – similar to the claims against the other high-ranking officials involved in this appeal – make clear that the supporting allegations are merely the fruit of assumptions and leaps of logic based on Hasty's position as warden at the MDC. However, assumptions of liability based on drawing a line up an alleged perpetrator's chain of command undermines a supervisory official's right to qualified immunity. Indeed, the doctrine of *respondeat superior* does not apply in a *Bivens* action, *see Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978) (rejecting *respondeat superior* in the § 1983 context),[8] and Iqbal's attempt to circumvent this rule with boilerplate catchphrases should not survive the application of *Twombly's* plausibility standard.

Thus, if the fundamental principles of the qualified immunity doctrine are to be preserved, *Bivens* plaintiffs cannot be permitted to bring claims against federal officials by relying on baseless conclusory allegations of this type. This case is illustrative of this potential; the Second Circuit's decision permits Iqbal to reach to the highest levels of our federal government with the simple inclusion of a few magic words such as "created a custom or policy" and "knew or should have known of" certain acts but "failed to remedy them." The danger this creates – as the

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alleging that Zenk called Iqbal a "terrorist" to support Iqbal's allegation that Zenk acted with discriminatory animus against him. *See* Compl. ¶ 87; App. 170a.

[8] *See also Int'l Action Ctr. v. United States*, 365 F.3d 20, 27 (D.C. Cir. 2004) (Roberts, J.) (finding that *respondeat superior* is "clearly barred" under § 1983); *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002) ("[a] supervisor may not be held liable . . . merely because his subordinate committed a constitutional tort").

Second Circuit itself noted – is that any enterprising plaintiff can employ similar logic to open an entire chain of command to liability for inappropriate acts of a low-level rogue officer. *See Iqbal*, 490 F.3d at 179; App. 69a (Cabranes, J., concurring). Because of the ease by which such allegations can be made, it would undermine the *immunity* component for all supervisory officials – exposing them to some level of discovery any time a plaintiff alleged that a subordinate officer violated the plaintiff's constitutional rights.

Nor does the fact that Hasty was located at the MDC and had a more direct supervisory authority over the alleged perpetrators render Iqbal's claims against Hasty any more plausible than Iqbal's claims against Ashcroft and Mueller. Potentially lost in the shuffle of Iqbal's various conclusory assertions against Hasty is the fact that the MDC is a massive institution, rising nine stories high and housing over 2,000 inmates at any given time. *See* OIG Report at 111, n.88. Thus, it cannot be plausible simply to assume that Hasty had knowledge of everything that occurred within the MDC's walls. Because *respondeat superior* is not applicable in *Bivens* cases, Iqbal – or any prisoner, for that matter – should not be allowed to do an "end-around" this rule. Instead, they should be required to establish a plausible basis to subject a warden to the burdens of civil litigation. If a bare allegation of *knowledge* satisfies the plausibility test, a warden would face personal liability for virtually *anything* that happens within his prison, regardless of any actual connection to the act giving rise to the claim. Certainly, if qualified immunity is to have any meaning for a prison warden, the Second Circuit's loose interpretation of the rules of civil pleading cannot stand.

In short, this case presents precisely the type of "artful pleading" that this Court warned against over 25 years ago in *Harlow*. 457 U.S. at 808. Accordingly, to give meaning to the jurisprudence established by this Court – from *Harlow*, to *Monell*, to *Crawford-El*, and leading up to *Twombly* – this Court must demand factual specificity in the allegations against Hasty and the other high-ranking federal officials named as defendants in Iqbal's Complaint before he should be allowed to test his claims in discovery.

II. CONSTRUCTIVE KNOWLEDGE IS NOT A PROPER BASIS FOR IMPUTING LIABILITY TO A SUPERVISORY OFFICIAL FOR THE ACTS OF HIS SUBORDINATES.

The second question presented in Ashcroft and Mueller's petition compels this Court to review the legal standard for "supervisory liability" in *Bivens* cases as established by the Second Circuit. The Second Circuit set forth its articulation of the standard as follows:

> The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated.

Iqbal, 490 F.3d at 152-53; App. 14a (citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)). Bound to

follow this established precedent, the Second Circuit did not consider its propriety. But as the petitioners' brief demonstrates, this Court should reject this standard as too permissive. Specifically, the Second Circuit's acceptance of liability for a "grossly negligent" supervisor cannot be reconciled with prior decisions of this Court.

In *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), this Court rejected the lower court's finding that supervisory officials were liable for violations committed by subordinate police officers because "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisory officials] express or otherwise showing their authorization or approval of such misconduct." The Court further determined that a "causal connection" between the defendants' "affirmative" conduct and the alleged harm was required to find liability under § 1983. *Id.* at 371, 377. Furthermore, this Court's decisions in the municipal liability and Eighth Amendment contexts reaffirmed this principle. *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997); *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994).

The Second Circuit vitiates these requirements, however, by accepting a "grossly negligent" standard because it permits a *Bivens* plaintiff to bring a claim against a supervisory official who did nothing to cause the harm alleged, nor had any actual knowledge that such harm occurred. Other federal circuit courts, including the United States Court of Appeals for the District of Columbia in *International Action Center*, 365 F.3d at 28 – an opinion authored by then-Judge Roberts – have recognized the significance of *Rizzo* and have rejected the reliance on a theory

of negligent supervision. *See also Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 (3d Cir. 1995); *Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992).

The flaw in the Second Circuit's approach – like the failure in Iqbal's pleadings – is amplified by the need to preserve the qualified immunity of supervisory officials. Allowing cases to go forward based on a constructive notice theory exposes high-ranking officials to untold numbers of *Bivens* suits because potential claimants can drag these officials into their lawsuits on speculative theories that mere negligence can be proved. As to Hasty, who managed a large prison institution, the possibilities of lawsuits based on this theory brought by the thousands of inmates that were under his authority – for the acts of any number of subordinates of which he was entirely unaware – further supports the rejection of this avenue of liability.

Thus, as more fully explained by petitioners Ashcroft and Mueller, this Court should reject the Second Circuit's use of a constructive notice standard in *Bivens* cases.

CONCLUSION

This Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

MICHAEL L. MARTINEZ *
DAVID E. BELL
MATTHEW F. SCARLATO
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

* Counsel of Record

Counsel for Respondent Dennis Hasty

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RESPONDENT'S BRIEF

No. 07-1015

SUPREME COURT, U.S.
OCT 24
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT JAVAID IQBAL

DAVID J. BALL
RIMA J. OKEN
JENNIFER BRACE
ETAI LAHAV
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8323

ALEXANDER A. REINERT
Counsel of Record
JOAN M. MAGOOLAGHAN
ELIZABETH L. KOOB
KOOB & MAGOOLAGHAN
221 DeVoe Avenue
Yonkers, New York 10705
(914) 964-8888

Counsel for Respondent Javaid Iqbal

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Prior to addressing the questions sought to be presented by petitioners, this Court must first determine whether it may exercise jurisdiction. Brief in Opp. 34-35. In particular, the Court must determine whether there is interlocutory appellate jurisdiction to review petitioners' first question presented, which challenges the district court's nonfinal judgment that respondent's complaint sufficiently alleges that petitioners were personally involved in creating what all parties agree was an unconstitutional policy. In addition, this Court must determine whether it has jurisdiction to address the second question sought to be presented by petitioners, which was neither raised nor addressed below, and which is not even implicated by respondent's complaint in this case.

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BRIEF FOR RESPONDENT JAVAID IQBAL

PRELIMINARY STATEMENT

The issues presented by this case have no connection to qualified immunity. Instead, petitioners' first question presented, properly understood, implicates only pleading standards under Fed. R. Civ. P. 8(a) and 9(b)—essentially, whether respondent Javaid Iqbal's complaint adequately alleges petitioners' personal involvement in specific unconstitutional conduct. *See* Br. for Petrs. 30-33. There is no appellate jurisdiction to consider this question because the determination by the district court that respondent's complaint sufficiently alleges petitioners' personal involvement is not a final decision under 28 U.S.C. § 1291. And the exception permitting interlocutory jurisdiction in qualified immunity appeals, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), does not apply here because petitioners do not seek to review the Second Circuit's determination that they behaved unreasonably in light of clearly established law. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *see also Johnson v. Jones*, 515 U.S. 304, 318 (1995). Nor may this Court exercise jurisdiction over petitioners' second question, which they waived below and which is not even implicated by respondent's allegations against petitioners.

If the Court, however, elects to exercise jurisdiction over the first question presented, the Second Circuit's decision should be affirmed. At the outset, the fundamental premise of petitioners' argument—that the Second Circuit has "vitiated" petitioners' qualified immunity defense by subjecting them to

discovery and liability based on "conclusory" allegations, Br. for Petrs. 29—is groundless hyperbole. The Second Circuit directed that discovery against petitioners shall only take place after all other discovery is complete and then only if discovery from other sources establishes the need to seek information personally from petitioners—it did not hold that respondent's allegations alone were sufficient to obtain discovery from petitioners. *See* Pet. App. 26a-27a, 67a.

Petitioners argue that respondent's complaint should have been dismissed for its supposed failure to sufficiently allege their person involvement in the Government's policy of unlawful discrimination against post-September 11 detainees on the basis of race, religion, and national origin. This argument is refuted by the complaint's clear statement that petitioners "designed," "approved," "condoned," and "agreed" with the policy of classifying detainees for confinement under restrictive conditions based upon their race, religion, and national origin. Pet. App. 168a, 172a-73a (Compl. ¶¶ 69, 96-97).

Petitioners maintain that the rules of pleading mean something different for them than any other litigant because they are "high-ranking" defendants who invoked a qualified immunity defense below and who claim that they were acting to further national security interests. *See* Br. for Petrs. 18-19, 27-29. To accept petitioners' submission requires this Court to ignore several dispositive sources of law. The plain language of the Federal Rules of Civil Procedure does not admit of distinctions based on the identity of defendants, the type of action brought, or the possibility that a qualified immunity defense may be invoked. This Court's longstanding interpretation of these Rules establishes that heightened pleading

standards like the one proposed by petitioners may only be imposed through legislation or by amendment of the Rules. And the affirmative defense of qualified immunity has never been held to alter relevant pleading standards. See, *e.g.*, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Lower courts can give full force to the qualified immunity defense without the vague, unsupported, and incoherent pleading rule sought by petitioners.

STATEMENT OF FACTS

1. Beginning in January 2002, respondent Javaid Iqbal was held for more than 150 days in a maximum security unit in Brooklyn, New York's Metropolitan Detention Center ("MDC") that was known as the "ADMAX SHU"—short for Administrative Maximum Special Housing Unit. He was held there because he was presumptively categorized as "of high interest" to the September 11th investigations, solely because of his race, religion, and national origin, and for no legitimate reason. Pet. App. 164a-165a, 172a-173a (Compl. ¶¶ 48-53, 96). In the ADMAX SHU, Mr. Iqbal was subjected to solitary confinement, unnecessary and abusive strip searches, and beaten by correction officers, among other abusive conditions. *Id.* 166a, 170a-171a, 176a-177a, 181a-187a (Compl. ¶¶ 60, 63, 84, 87, 89, 113, 116-17, 120, 122, 137-148, 153-54, 158, 168, 171).

After he was released, Mr. Iqbal brought this lawsuit, seeking compensation for the central role that petitioners and other federal officials played in subjecting him to harsh conditions of confinement. Mr. Iqbal brought claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for violations of

his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims, including Federal Tort Claims Act claims against the United States.

2. The complaint alleges that specific defendants crafted, directed, and implemented practices and procedures regarding the confinement of "high interest" detainees in the ADMAX SHU. Among these officers were petitioners, former Attorney General John D. Ashcroft and current Director of the Federal Bureau of Investigation ("FBI") Robert Mueller, who crafted, approved, and directed, "as a matter of policy" that detainees like respondent would be confined in the ADMAX SHU solely because of membership in protected classes. Pet. App. 172a-173a (Compl. ¶ 96-97).

The complaint was filed after the Office of Inspector General of the Department of Justice had investigated and confirmed accounts of abuse of September 11 detainees like Mr. Iqbal. *See* Office of the Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003), <http://www.usdoj.gov/oig.special/0306/full.pdf> ("*OIG Report*"). And although respondent's complaint does not incorporate the OIG Report in its pleadings, the courts below have looked to the report to place respondent's allegations in context. Pet. App. 116a & n.20. For instance, the OIG Report made the following findings:

- Petitioners Ashcroft and Mueller met with their staff in the weeks after the September 11 attacks to plan the investi-

gation and detention of the detainees. *OIG Report* 12-13.

- From the start, the leads that the FBI investigated were largely based on suspects' protected class status and little else. *Id.* 16 .
- More than 95% of September 11 detainees came from Middle Eastern and South Asian countries. *Id.* 21.
- The "hold until cleared" policy, under which detainees were not released from custody until "cleared" of connection to terrorism, was not reduced to writing, but came from "'at least' the Attorney General." *Id.* 37-38.
- Petitioners attended "continuous meetings" in the first few months after the September 11 attacks at which the "hold until cleared" policy was discussed. *Id.* 39-40.
- September 11 detainees confined in the MDC were held in the ADMAX SHU as a matter of DOJ policy. *Id.* 118. Consistent with the general "hold until cleared" policy created by petitioners, detainees were released from ADMAX SHU only after being "cleared" by the FBI. *Id.* 160.

3. In October 2004, prior to engaging in discovery, several defendants and petitioners filed motions to dismiss respondent's complaint. Among other arguments, petitioners asserted that qualified immunity required dismissal of the complaint. The district court dismissed some of respondent's statutory claims, but permitted each of his *Bivens* claims to

proceed. Pet. App. 71a-150a. The court noted that "the post-September 11 context" supported respondent's assertion of petitioners' personal involvement, and that "some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved." *Id.* 116a-118a. Reasoning that Mr. Iqbal "should not be penalized for failing to assert more facts" given that the extent of defendants' "involvement is peculiarly within their own knowledge," *id.* 118a, the court concluded that the facts alleged in respondent's complaint were sufficient. The district court also found that the OIG Report, which it examined at the invitation of defendants below, suggested that petitioners were personally involved in "creating or implementing" the policies that led to respondent's confinement in the ADMAX SHU. *Id.* 116a n.20. Nonetheless, the district court limited the discovery that could be sought from petitioners to issues directly related to their personal involvement in the alleged unconstitutional conduct. *Id.* 119a. Eight defendants then noticed appeals to the Second Circuit Court of Appeals.

4. A panel of the Second Circuit affirmed the district court's opinion in large part. *Id.* 1a-70a. As to petitioners, the appellate court found that respondent's discrimination-based claims should proceed. *Id.* 58a-63a. The court rejected petitioners' argument that the complaint did not adequately state a discrimination claim because of the following allegations: (1) petitioners' policy targeted respondent and others like him for special detention because of their race, religion and national origin; (2) petitioners adopted the policies and practices challenged in the instant case; (3) the FBI's arrest of thousands of

Arab and South Asian Muslims was under petitioner Mueller's direction; and (4) petitioners knew of, condoned and agreed to subject respondent to harsh conditions of confinement solely because of his membership in protected classes and not for any legitimate reason. *Id.* 62a. The court also held that petitioners were not "necessarily insulate[d]" from liability simply because subordinates classified respondent as "of high interest," because petitioners likely "concerned themselves with the formulation and implementation of policies dealing with the confinement of those . . . designated 'of high interest' in the aftermath of 9/11." *Id.* 59a, 62a.

The Court of Appeals also made several critical legal conclusions. First, the Second Circuit correctly interpreted this Court's decisions in *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) to mean that heightened pleading standards are inappropriate absent authorization from a statute or the Federal Rules. Pet. App. 16a-17a. Second, it interpreted this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), to require a "pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible.*" Pet. App. 24a-25a (emphasis in original). Third, to the extent that a defendant believes that *some* elements of a plaintiff's claim are based on "conclusory" allegations, the Second Circuit pointed to Fed. R. Civ. P. 12(e) as a remedy, consistent with this Court's suggestion in *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Pet. App. 26a. Finally, the court provided explicit directions to the district court to oversee discovery with an eye to-

wards preserving the substance of the qualified immunity defense, precluding discovery against petitioners until all other sources had been exhausted and permitting discovery only if those sources confirmed the need to seek information from petitioners. *Id.* 26a-27a.

SUMMARY OF ARGUMENT

I. No interlocutory jurisdiction exists to review the first question presented by petitioners—whether respondent has sufficiently alleged that petitioners were personally involved in an unconstitutional policy of classifying detainees and approving restrictive conditions of confinement based on their race, religion, and national origin. The district court's determination that the complaint makes sufficient allegations of personal involvement under Rule 8 is not a final decision under 28 U.S.C. § 1291. Petitioners attempt to link their pleading argument to the affirmative defense of qualified immunity, the denial of which on its merits would create a right to an interlocutory appeal. But the distinct issues of qualified immunity which are subject to interlocutory appeal—whether petitioners behaved reasonably in light of "clearly established" law—do not extend to the merits-based question of whether the complaint's allegations are pleaded with sufficient detail. *Mitchell*, 472 U.S. at 528 (holding that an appellate court considering the denial of an immunity claim may not "determine whether the plaintiff's allegations actually state a claim"). Additionally, this Court lacks jurisdiction over the second question presented by petitioners because it was waived below and it is not

germane to the allegations stated in respondent's complaint.

II. Even if this Court has jurisdiction over the first question, petitioners' arguments should be rejected. Petitioners rest on the alleged insufficiency of respondent's complaint to "overcome petitioners' [affirmative] defense of qualified immunity." (Br. for Petrs. 15.) However, petitioners did not seek certiorari on the merits of their qualified immunity defense—whether the relevant law was clearly established or whether petitioners' conduct was objectively reasonable in light of clearly established law. Pet. (I). Accordingly, the heart of petitioners' argument is that the pleading standard imposed by Fed. R. Civ. P. 8 and 9 is different for cases in which the affirmative defense of qualified immunity is invoked by "high-ranking" defendants who acted during a threat to national security.

The text of Rules 8 and 9 makes no distinction based on the existence of an affirmative defense, the status of a defendant, or the presence or absence of national security concerns. The longstanding rule, embodied by the decision below, is that complaints need only meet the standards set forth in Rule 8, unless a statute imposes a higher pleading standard or the subject matter falls into the particularized requirements of Rule 9, neither of which is the case here. *See Leatherman*, 507 U.S. at 168-169; *Swierkiewicz*, 534 U.S. at 514-515. As this Court has emphasized numerous times, "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Hill v. McDonough*, 547 U.S. 573, 582 (2006); *accord Bell Atlantic*, 127 S. Ct. at 1973 n.14.

Petitioners seek to avoid the force of this precedent by describing their proposed pleading rule as a "context-specific" standard and not a heightened pleading standard. At the same time, however, they ask this Court to adopt a new standard requiring more factual specificity for claims brought against petitioners than for claims brought against their co-defendants, solely because of petitioners' "high-ranking" status, even when the subject matter of the claim is the same and even when the same unconstitutional conduct is being challenged. The only reasonable construction of petitioners' rule is that it calls for heightened pleading.

Besides requiring a heightened form of pleading that has no basis in the Federal Rules, there is no support in law or logic for petitioners' proposed rule. Petitioners' argument primarily relies on general statements contained in qualified immunity cases which stand for the noncontroversial propositions that qualified immunity is important, should be resolved as early as possible, and, when valid, protects officials from both trial and the discovery process. None of these principles can bear the weight of petitioners' proposal that a different pleading standard applies when qualified immunity is raised.

Moreover, petitioners ignore the general rule that plaintiffs do not have a duty to anticipate or rebut an affirmative defense. *Jones v. Bock*, 127 S. Ct. 910, 921 (2007); *Gomez*, 446 U.S. at 640. Thus, the invocation of qualified immunity *after* a complaint is filed cannot affect the standard by which the sufficiency of a complaint is judged under Rule 8. In a case heavily relied upon by petitioners, this Court held as much, summarizing its precedents and stating that it has "refused to change the Federal Rules governing

pleading by requiring the plaintiff to anticipate the immunity defense." *Crawford-El*, 523 U.S. at 595.

The Federal Rules, shorn of petitioners' embellishments, also plainly rebut petitioners' contention that respondent need to have pleaded more factual detail to support the allegation that petitioners "intended" to discriminate on the basis of race, national origin, and religion, or that they had "knowledge" of such discrimination. Br. for Petrs. 31-32. Such an argument is foreclosed by Rule 9(b), which specifically provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

This Court instructively rejected a proposal that the Attorney General be shielded by absolute immunity in *Mitchell*, 472 U.S. at 523-24.. If *Mitchell* has any meaning, there will be some, albeit rare, cases in which officials like petitioners may properly be subject to discovery and possibly even trial. Here, the Court of Appeals correctly recognized that this is one such case and that discovery, properly cabined, may be appropriate and necessary to resolving respondent's allegations. Because the lower court's decision is both consistent with this Court's precedents and a sensible way of resolving the important interests at stake in this litigation, the decision below should be affirmed.

ARGUMENT

I. THERE IS NO INTERLOCUTORY JURISDICTION OVER EITHER QUESTION PRESENTED BY PETITIONERS

This Court may not exercise interlocutory jurisdiction over either of the questions sought to be presented by petitioners.

A. THE SECOND QUESTION SOUGHT TO BE PRESENTED BY PETITIONERS WAS NEITHER RAISED NOR DECIDED BELOW, AND IS NOT IMPLICATED BY RESPONDENT'S COMPLAINT

The lack of jurisdiction over the second question presented—whether an allegation that high-ranking defendants had constructive knowledge that subordinates acted unconstitutionally suffices to state a claim for supervisory liability—may be disposed of quickly.

The Second Circuit never addressed any constructive knowledge theory of liability, and despite its cursory reference to a "gross negligence" standard of supervisory liability, Pet. App. 14a, the appeals court did not apply this theory to the claims brought against petitioners. Indeed, respondent has never even *alleged* that petitioners are liable under a gross negligence theory.

Notwithstanding the fact that respondent did not rely on this theory and the Second Circuit did not apply it, petitioners argue that the Second Circuit's precedent would permit liability based on a gross negligence theory. Not only would a ruling by this Court on that claim be purely advisory, but petition-

ers waived the argument in the Court of Appeals by conceding the validity of the very theory they now challenge:

> Agency heads (or former agency heads) therefore cannot be held liable for the wrongs committed by their subordinates in carrying their duties, absent a showing of "direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates."

(Opening Appellate Br. for Petitioners at 34 (*quoting Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996)). There being no live dispute between the parties regarding a constructive knowledge theory of liability and there being no jurisdiction to address it, petitioners' second question will not be discussed further in this brief and should be dismissed.

B. Appellate Jurisdiction Does Not Exist to Consider the District Court's Nonfinal Determination that the Complaint Sufficiently Alleges Personal Involvement

A decision denying a motion for summary judgment or a motion to dismiss is not a final decision subject to immediate appeal. 28 U.S.C. § 1291. Thus, jurisdiction over the district court's decision only exists in the limited circumstances established by the collateral order doctrine of *Cohen v. Beneficial*

Industrial Loan Corp., 337 U.S. 541 (1949). And while this Court has approved of the exercise of jurisdiction over the denial of a motion for summary judgment or motion to dismiss based on qualified immunity, *Mitchell*, 472 U.S. at 526, *Behrens*, 516 U.S. at 313, it also has made clear that not every denial of qualified immunity is subject to appeal. *See Johnson*, 515 U.S. at 314.

From the inception of the doctrine, *Mitchell* made clear that what is immediately appealable in a qualified immunity case is the "essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell*, 472 U.S. at 526. This issue, on which petitioners here did not seek certiorari,[1] is "conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28. Indeed, in prescient language, the *Mitchell* Court emphasized that an appellate court considering the denial of an immunity claim "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations *actually state a claim*." *Id.* at 528 (emphasis added). Instead, an appellate court need only answer a "question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . . ." *Id.*

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[1] *Amici curiae* supporting petitioners make arguments regarding the Second Circuit's clearly established law holdings, Br. *Amici Curiae* of William P. Barr, et al. at 19-26, but these arguments are not encompassed by the questions presented and may not be considered here. In any event, contrary to *amici*'s insinuation, petitioners have never claimed that any lack of specificity in respondent's complaint made it impossible for petitioners to raise their qualified immunity defense.

The qualified immunity cases that have come before this Court confirm that a qualified immunity appeal based solely on the complaint's failure to state a claim, and not on the ultimate issues relevant to the qualified immunity defense itself, is not a proper subject of interlocutory jurisdiction. Thus, in *Mitchell*, this Court only took up the question of whether it was clearly established in 1970 (the relevant time period for the complaint in *Mitchell*) that "a warrantless wiretap aimed at gathering intelligence regarding a domestic threat to national security" was illegal, 472 U.S. at 530; the sufficiency of the pleadings in that case was never discussed. And in *Behrens*, this Court stated that the *Mitchell* exception for interlocutory appeals of qualified immunity decisions permits appellate courts to decide pure issues of law like "whether the federal right allegedly infringed was 'clearly established.'" *Behrens*, 516 U.S. at 313.

This limitation on interlocutory appeals of qualified immunity follows from the *Cohen* doctrine, which permits review of collateral orders that "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The second *Cohen* factor is the principal one advising against jurisdiction here. *See Mitchell*, 472 U.S. at 529 n.10 (holding that legal issue present in qualified immunity cases is appealable because it "can be decided . . . in isolation from the remaining issues of the case"). It is this separateness requirement that is considered essential to the *Mitchell* Court's reference to appellate courts not "'even determin[ing]

whether the plaintiff's allegations actually state a claim.'" *Johnson*, 515 U.S. at 312 (*quoting Mitchell*, 472 U.S. at 528).

Thus, a district court's order rejecting a qualified immunity defense is not immediately appealable if the order is based on the sufficiency of evidence, because that determination "is not truly 'separable' from the plaintiff's claim." *Johnson*, 515 U.S. at 313 (finding no interlocutory jurisdiction to consider arguments merely because they "happen to arise in a qualified-immunity case"). And when bringing a qualified immunity appeal, the defendant must accept the *plaintiff's* version of the facts as adopted by the district court so that the appellate court can review the district court's determination of the "purely legal issue [of] what law was 'clearly established,'" and need not consider the correctness of the plaintiff's version of the facts. *Johnson*, 515 U.S. at 313.[2] By analogy, determinations of pleading sufficiency are similarly appealable only insofar as they relate to purely legal questions unique to the qualified immunity defense. *Cf. Crawford-El*, 523 U.S. at 589 (distinguishing the evidentiary standard for plaintiff's showing of improper intent, "a pure issue of fact,"

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[2] The Court's decision in *Scott v. Harris*, 127 S. Ct. 1769 (2007), is not to the contrary. First, the *Scott* Court did not explicitly address the jurisdictional question raised here. Second, even if *Scott* can be read as implicitly approving the exercise of jurisdiction over some factual sufficiency determinations in qualified immunity appeals, the Court specifically tied its review of the district court's determination to the existence of material in the record that "quite clearly contradict[ed]" the lower courts' interpretation of the factual material. *Id.* at 1775. In the absence of such contradictory record evidence, this Court recognized that it was bound to accept the determinations made by the district court. *Id.*

from the "separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an 'essentially legal question'") (quoting *Mitchell*, 472 U.S. at 526-29).

The Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), does not alter this framework. *Saucier* simply confirms that courts considering the qualified immunity inquiry must look at the alleged constitutional violation through two temporal lenses: first whether the allegations in the complaint establish a violation of law *now*, and second whether the same violation was clearly established at the time of the alleged unconstitutional conduct. Here, petitioners concede that if respondent's allegations are proven, they establish a violation of clearly established law; petitioners only complain that the allegations are not sufficient. If *Saucier* had intended to alter the jurisdictional framework of qualified immunity questions such that any determination that a complaint met Rule 8(a)'s standards would be subject to immediate appeal, one would have expected some mention of that in the case. Jurisdiction was not even disputed in *Saucier*, nor was it discussed at oral argument. *See* Brief for Respondent in *Saucier v. Katz*, No. 99-1977, at 1, available at 2001 WL 173527; Tr. of Oral Argument in *Saucier*, available at 2001 WL 300596. Thus, even after *Saucier*, appellate courts considering appeals of qualified immunity questions must accept the district court's resolution of the sufficiency of proof, in summary judgment appeals, or the sufficiency of pleading, in motion to dismiss appeals, but need not defer to the district court's finding that such proof or allegations establish violations of law through *Saucier*'s dual temporal lenses.

C. THE SAME CONSIDERATIONS THAT LIMIT INTERLOCUTORY JURISDICTION IN QUALIFIED IMMUNITY APPEALS PREVENT THE EXERCISE OF APPELLATE JURISDICTION HERE

The reasoning from *Johnson* as to why issues of factual sufficiency are not immediately appealable in a qualified immunity case is fully applicable to the instant case. First, petitioners make no argument regarding the actual qualified immunity issue of the objective reasonableness of their conduct as measured by clearly established law. *Johnson*, 515 U.S. at 313. The Second Circuit rejected petitioners' arguments regarding clearly established law, and their petition for certiorari did not address that holding. Second, the issue of the sufficiency of respondent's allegations against petitioners is inseparable from the merits of the action. *Id.* at 314. And there is no colorable argument that the sufficiency of the pleadings is only put in play by qualified immunity; like the sufficiency of the evidence in *Johnson*, the issue of the sufficiency of the pleadings is present "even in the absence of qualified immunity." *Id.* at 314.

Finally, here the lower courts have indicated that they will revisit the issue of personal involvement after limited discovery that may not even involve depositions of the petitioners. *Id.* at 317 (permitting interlocutory appeal of sufficiency determination "makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision"); Pet. App. 26a-27a. Here, just as in *Johnson*, petitioners ask this Court to take what might be a "small step beyond *Mitchell*" that "would

more than relax the separability requirement – it would in many cases simply abandon it." *Johnson*, 515 U.S. at 315.

Further, the risk that petitioners may have to respond to discovery is insufficient standing alone to justify the exercise of interlocutory jurisdiction. *Id.* at 317-18. The "avoidance of litigation for its own sake" is not enough to trigger an interlocutory appeal. *Will v. Hallock*, 546 U.S. 345, 353-54 (2006). If *Cohen*'s exception applied to every aspect of every decision in which qualified immunity had been raised, "collateral order appeal would be a matter of right whenever . . . a federal officer lost [a motion to dismiss] on a *Bivens* action . . . ." *Id.* The result would mean that the finality required by Section 1291 "would fade out whenever the government or an official lost an early round that could have stopped the fight," imposing a substantial burden on appellate courts. *Id.*

D. Petitioners May Not Rely on a Background Allegation of Qualified Immunity To Bootstrap Jurisdiction Over an Otherwise Unappealable Decision

The exercise of interlocutory jurisdiction over qualified immunity appeals cannot be used as a pretense "to lead the court to review . . . underlying," and sometimes "more important," otherwise unappealable issues. *Johnson*, 515 U.S. at 318. And as this Court stated in *Gomez*, it has never "indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action." 446 U.S. at 640. Like any affirmative defense, qualified immunity cannot logically have any effect on the pleading

standard by which a complaint is judged. Thus, circuit courts find no interlocutory jurisdiction to review a denial of a motion to dismiss for failure to state a claim, even when a defense of qualified immunity lurks in the background. *See, e.g., Brown v. Miller*, 519 F.3d 231, 238 (5th Cir. 2008).

Similarly, this Court has rejected the claim that a denial of summary judgment should be immediately appealable by a municipality that claims that a particular official was not a "final policymaker" as is required for *Monell* liability. *Swint v. Chambers County Com'n*, 514 U.S. 35, 42-43 (1995). Like the arguments made here by petitioners regarding their lack of personal involvement, the municipality in *Swint* raised only a "'mere defense to liability.'" *Id.* (*quoting Mitchell*, 472 U.S. at 526). Nor does the Court's exercise of jurisdiction over the question of the elements of a cause of action affect the outcome here, because petitioners are making an argument about nothing more than the "sufficiency of the [pleading]," and not about some essential element of the cause of action against petitioners. *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006) (addressing retaliatory prosecution claim).[3]

Making the bootstrapping worse, petitioners did not even present to the lower courts the specific argument pressed here—that the relevant pleading standard is mediated by the status of the defendant, the existence of a qualified immunity defense, and the defendants' claim that national security interests informed their policy choices. Instead, as to the suf-

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[3] A different jurisdictional question would be presented if petitioners had sought to limit discovery through a mandamus action, *See Cheney v. United States Dist. Ct. for District of Columbia*, 542 U.S. 367 (2004).

ficiency of the personal involvement allegations in the complaint, petitioners only argued that respondent's allegations were "patently absurd," (Opening Appellate Br. for Petitioners at 48) or "untenable and unsupportable," (*id.* at 49). They did not argue that pleading was "context-specific" in any way, and specifically disclaimed any reliance on a heightened pleading standard. (Reply Appellate Br. for Petitioners at 4.) Therefore, the lower courts have not even had the opportunity to pass on the question presented here, making the exercise of jurisdiction improper. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Relatedly, exercising jurisdiction at this point would also be premature. Consistent with this Court's admonition in *Crawford-El*, the Second Circuit remanded this case to the district court to permit limited discovery regarding the qualified immunity defense raised by petitioners and others. Pet. App. 26a-27a. The lower court quite clearly stated that petitioners would not have to respond to discovery demands until all other avenues had been exhausted and unless respondent could show a basis for believing that discovery from petitioners would be fruitful. *Id.* Petitioners retain the ability to argue that they are entitled to qualified immunity at each progressive stage of discovery, and to appeal such a determination if necessary. Pet. App. 27a. The lower court's ruling thus effectively protects petitioners and their codefendants from the burdensome discovery that justifies interlocutory jurisdiction.

II. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE FEDERAL RULES, PLEADING STANDARDS, AND QUALIFIED IMMUNITY PRINCIPLES

Even if this Court were to exercise jurisdiction over the first question presented by petitioners, the Second Circuit's decision should be affirmed. Petitioners never explicitly state what rule they would have this Court adopt, but they appear to argue that three factors change the pleading landscape in this case: the presence of (1) "high-ranking" defendants who (2) invoke the affirmative defense of qualified immunity and (3) claim that their conduct was motivated by national security concerns. Br. for Petrs. 16-21, 40-41. Petitioners do not find support for their argument in the text of the Federal Rules, nor do they point to any case in which the pleading standards have been adjusted in the manner and for the reasons proposed here.

Petitioners' arguments instead rest on a misapplication of relevant precedent and a mischaracterization of respondent's complaint, and would require this Court to ignore the Federal Rules of Civil Procedure. Even if these substantial barriers could be put aside, the rule proposed by petitioners is incoherent and would lead to confusion in the lower courts. The Second Circuit's resolution of this case, by contrast, is consistent with this Court's precedents and the Federal Rules, guarantees both consistency and coherence in the lower federal courts, and assures fairness to petitioners.

A. No Heightened Pleading Standard Applies To This Case

Prior to the adoption of the Federal Rules of Civil Procedure, pleading was claim specific and required adherence to technicalities that the drafters of the Rules sought to eradicate. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 438-40 (1986). Thus, the goal of the Federal Rules was to create both simplicity and uniformity in pleading, and prevent premature dismissals. *See id.* at 439 ("Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'"); *Swierkiewicz*, 534 U.S. at 513-14. Petitioners' arguments would mark a return to the special forms of pleading that were abolished by the Federal Rules by forcing plaintiffs and courts to consider whether a particular defendant is "high-ranking," whether the defendant will invoke a qualified immunity defense, and whether the subject area of the litigation—like national security—suggests a need for more detailed pleading.

In conformance with the purpose of the Federal Rules, this Court has consistently emphasized Rule 8's liberality while advising against misguided attempts to carve out particular classes of action for heightened pleading requirements. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), this Court rejected a Fifth Circuit rule requiring that Section 1983 complaints against municipal corporations "state with factual detail and particularity the basis for the claim." *Leatherman*, 507 U.S. at 167. Writing for a unanimous Court, Chief Justice Rehnquist declared

this standard "impossible to square ... with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168. *Leatherman* explained that lower courts' adoption of heightened pleading standards in service of perceived policy aims misapprehends the proper judicial role in this area, because changes to pleading standards must be accomplished through amendment of the Federal Rules "and not by judicial interpretation." *Id.*

A decade after *Leatherman*, this Court again unanimously struck down a heightened pleading standard, establishing that there is a distinct line between standards of pleading and standards of proof and that no heightened pleading requirement could properly be derived from the requirements for establishing a prima facie case at trial. *See Swierkiewicz*, 534 U.S. at 510. The Court cautioned that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits. *Id.* at 512-13. In this connection it reiterated *Leatherman*'s admonition that a "requirement of greater specificity for particular claims," whatever the "practical merits," may be obtained only "by the process of amending the Federal Rules," not by judicial fiat. *Id.* at 514-15 (quotation marks omitted); *see also Crawford-El*, 523 U.S. at 595 ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").[4]

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[4] *Amici* supporting petitioner suggest that, because this is a *Bivens* case rather than a Section 1983 action, this Court has more leeway to impose heightened pleading rules absent Congressional direction. Br. Amici Curiae of William P. Barr, et al.,

1. Petitioners' suggestion that the qualified immunity inquiry is different for claims brought against high-level officials in the national security context cannot be squared with this court's precedents

Petitioners do not point to any part of the Federal Rules or any Congressional action that justifies applying a heightened pleading standard to the claims brought against them in this case. Instead, petition-

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at 29-30. This argument was never raised below, and in any event is rebutted by evidence that Congress is well aware of the significance of *Bivens* claims but has never taken action to adjust the pleading standards for them. Indeed, Congress has acted in other ways to limit access to courts in particular *Bivens* actions. *See* 42 U.S.C. § 1997e(a) (imposing exhaustion requirement on *Bivens* actions involving prison conditions, thus abrogating *Mccarthy v. Madigan*, 503 U.S. 140 (1992).) This Court recognized in *Crawford-El* that Congressional action in passing Section 1997e, which did not make distinctions based upon claims that involve official state of mind, counseled against imposing such a distinction by judicial fiat. 523 U.S. at 597 ("If there is a compelling need to frame new rules of law based on such a distinction, presumably Congress either would have dealt with the problem . . . or will respond to it in future legislation."). Moreover, Congress has considered *and rejected* numerous bills that would protect federal officials from *Bivens* suits by amending the Federal Tort Claims Act to waive the sovereign immunity bar to compensation for constitutional torts. *See* Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under *Bivens*, 88 Geo. L. J. 65, 98 (1999); William Castro, Government Liability for Constitutional Torts: Proposals to Amend the Federal Tort Claims Act, 49 Tenn. L. Rev. 201, 223 (1982) 201, 223 (1982).

ers begin by adverting to the general precedent that establishes the interests served by the qualified immunity defense. *See* Br. for Petrs. 16-19. Citing to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell*, and their progeny, petitioners correctly identify the interests that are protected by the qualified immunity defense and accurately state that, consistent with these goals, lower courts have been directed to resolve immunity questions at the earliest stage possible, and to protect officials against "broad-ranging" discovery until the immunity question is resolved. *Mitchell*, 472 U.S. at 525-27; *Harlow*, 457 U.S. at 814, 817-18; *see also Behrens* 516 U.S. at 306-08.

Petitioners attempt to leap from these general principles to two specific inferences without support: (1) that the interests at stake in qualified immunity are "at their height" in suits involving national security; and (2) that the protection afforded by qualified immunity is different for "high-ranking" officials than for other Executive Branch officials exercising discretionary responsibilities. Br. for Petrs. 18-19. For the first proposition, petitioners rely solely on an opinion concurring in the judgment in *Mitchell*. That opinion did not argue that the qualified immunity inquiry should be different where national security interests were involved, but instead argued that the Attorney General should have received *absolute* immunity for his conduct. 472 U.S. at 541 (Stevens, J., concurring in the judgment). The majority in *Mitchell*, by contrast, held that the Attorney General is entitled to the same qualified immunity as any other government official, even when he claims that his actions were motivated by national security concerns. 472 U.S. at 520-524. The Court thus rejected the premise at the heart of petitioners' argument

here, explicitly recognizing that the term "national security" "may cover a multitude of sins" and that no "built-in restraints" prevented actions in the name of national security that threaten important constitutional rights. *Id.* at 522-23.

As this Court declared, "the security of the Republic" will not be threatened if petitioners "on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States." *Id.* at 524. The Court observed that this "is as true in matters of national security as in other fields of governmental action." *Id.* Therefore, nothing in *Mitchell* supports the contention that the qualified immunity inquiry is different in cases that involve national security concerns.

Here, petitioners received all of the substantial protections contemplated by the qualified immunity defense and embraced by this Court—they raised it in their motion to dismiss, they were permitted to raise it in an interlocutory appeal, and they have had a stay of discovery against them throughout the proceedings. The Court of Appeals correctly rejected the defense, and instructed the district court to cabin discovery in such a way as to preserve the defense as much as possible in anticipation of a summary judgment motion. Pet. App. 26a-27a. Unable to argue that they were denied the protections of the qualified immunity defense by the courts below, petitioners maintain that allowing any discovery at all to go forward, even after their qualified immunity defense was rejected, undermines the purposes of qualified immunity. Similar arguments have been rejected by this Court. *See Will*, 546 U.S. at 353 ("Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized be-

cause the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was."); *Crawford-El*, 523 U.S. at 593 n.14 ("Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from all discovery.").

As for petitioners' contention that "high-ranking" officials are given more protection under qualified immunity than low level officials in the context of pleading standards, again there is no support even in the cases petitioners themselves cite. For instance, petitioners' quotation of language from *Harlow* for the proposition that "this Court has recognized that 'high officials require greater protection than those with less complex discretionary responsibilities,'" (Petrs.' Br. 18) is misleading. *Harlow*'s language referred to reasoning from *Scheuer v. Rhodes*, 416 U.S. 232 (1974), which clarified that, to account for the broad range of discretion afforded higher level officials, a court resolving a defense of qualified immunity must consider whether a particular defendant acted reasonably in the particular circumstances presented to him. 416 U.S. at 247-48. Although *Harlow* acknowledged this portion of *Scheur*, it followed that acknowledgement by stating that "[n]onetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity." 457 U.S. at 807. Neither *Scheur* nor *Harlow* addressed pleading standards, however. At most, *Scheur* simply held that the status of a defendant might affect how much discretion they are afforded, which in turn might influence what conduct could be considered objectively reason-

able in light of clearly established law, an issue not presented by the petition here.

Indeed, this Court has rejected the specific reasoning offered by petitioners quite forcefully, distinguishing between the line-drawing necessary to determine whether particular officials are entitled to absolute immunity and the absence of distinctions made between officials who are entitled to qualified immunity:

> Although we have in narrow circumstances provided officials with an absolute immunity, *see, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982), we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide.

Anderson v. Creighton, 483 U.S. 635, 642-643 (1987). Thus, not only is there no support in this Court's precedent for the lines sought to be drawn by petitioners here, but this Court has explicitly rejected drawing such lines.

2. Neither the presence of the affirmative defense of qualified immunity nor of allegations regarding petitioners' state of mind alters the relevant pleading standard

Even if petitioners had correctly distilled a line within qualified immunity jurisprudence that mediated immunity on the basis of the status of a defendant or the subject matter of a lawsuit, nothing suggests that differences in the protection afforded by qualified immunity may be incorporated into the pleading standard used to judge the sufficiency of complaints. *Mitchell* and its progeny do not support, implicitly or explicitly, different pleading standards where qualified immunity and national security intersect.[5] Indeed, petitioners point to no cases in which this Court has adopted such a rule for cases against high level State officials in Section 1983 litigation. *See Butz v. Economou*, 438 U.S. 478, 500 (1978) (finding no reason to accord federal defendants "a higher degree of immunity from liability" in *Bivens* actions than is accorded state actors when sued under Section 1983). Nor is there any support in the Rules for petitioners' broad claim that the presence of a qualified immunity defense for "high-ranking" defendants alters the pleading standard in

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[5] Nor do the Federal Rules state that the specificity necessary to state a claim depends on the *kind* of claim brought. 5 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1221 (3d ed. 2004) ("The same pleading philosophy discussed in the preceding sections controls in every case, regardless of its size, complexity, or the number of parties that may be involved.").

this case, even where petitioners claim that national security interests are implicated.

Aside from drawing a line based on status and subject area of litigation, petitioners also seek to draw from general qualified immunity cases the rule that there is a heightened pleading standard for cases against high level officials in which an officer's state of mind is at issue. Br. for Petrs. 20-21. There are several bars to this inferential leap. As an initial matter, petitioners make no effort to show how an "unduly permissive" pleading standard as to state of mind allegations, *id.* 19, could result in a defendant being improperly denied qualified immunity. If petitioners were correct, interlocutory jurisdiction would be proper any time a district court failed to grant a motion to dismiss by a government official, whether based on qualified immunity or any other argument. After all, if the harm of erroneously proceeding to discovery is the evil to be prevented by qualified immunity, then any decision that permits discovery should be subject to immediate appeal. This Court has never permitted such a rule. *Will*, 546 U.S. at 353-54.

Petitioners have mistaken one of the reasons for permitting the early resolution of the qualified immunity defense—protecting against "broad ranging" discovery, *Harlow*, 457 U.S. at 817-18—with an inexorable command that whenever discovery against government officials is contemplated, the purposes of qualified immunity are undermined. Where a qualified immunity defense is correctly rejected, however, allowing discovery against government officials does not undermine the purposes of the defense. In this sense, the evil to be prevented is not any discovery at

all, but discovery when a government official has a valid qualified immunity defense.

In addition to being unsupported by precedent, petitioners' proposed rule is contrary to the Rules and to this Court's consistent interpretation of them. The Rules themselves specifically contemplate that while allegations of fraud must be pleaded with "particularity," "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Rule 9(b) was incorporated in the original Rules and has never been amended. The Advisory Committee Notes to Rule 9 indicate that Rule 9(b) was adopted to be consistent with English rules of practice. *See* Fed. R. Civ. P. 9, Advisory Committee Notes to 1937 Adoption (citing *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22.) The English rules cited by Rule 9 state quite explicitly that when a plaintiff makes allegations as to any "condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred." Jeff Sovern, Reconsidering Federal Civil Rule 9(B): Do We Need Particularized Pleading Requirements in Fraud Cases? 104 F.R.D. 143, 146 n.19 (1985). There is good reason for this Rule. Requiring specificity in pleading states of mind

> would be unworkable because of the difficulty inherent in describing a state of mind with any degree of exactitude and because of the complexity and prolixity that any attempt to support these averments by setting forth all the evidence on which they are based would introduce

> into the pleadings. Moreover, a rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general "short and plain statement of the claim" mandate in Rule 8(a) and the liberal spirit the federal courts have accorded to applying it should control the second sentence of Rule 9(b).

5 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1301 (3d ed. 2004).

If Rule 9(b) means anything, it must be that allegations regarding state of mind can be alleged without reference to specific facts. After all, if allegations of fraud must be pleaded with "particularity," that must mean that allegations related to knowledge, intent, or motive, need not be pleaded with particularity. Thus, this Court has only required that specific facts are necessary to establish scienter where there has been explicit Congressional authorization to do so. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007).

Congress has taken this opportunity to require detailed fact pleading for particular categories of claims that have a state of mind element. *See, e.g.*, 15 U.S.C. § 78 u-4(b)(2) (requiring, in securities fraud class actions, that plaintiffs "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"). Here, by contrast, Congress has taken no steps to exempt *Bivens* actions from the command of Rule 8(a). Thus, "firm application" of the Federal Rules, as petitioners

propose, Br. for Petrs. 16, cannot support their proposed heightened pleading standard for claims implicating the state of mind of "high-ranking" government officials who assert that they acted to vindicate national security interests.

B. None of the Cases Relied Upon By Petitioners Supports Application of Their Novel Pleading Standard

When one steps back from general qualified immunity jurisprudence, petitioners are left with three sources of authority for their claim that this Court should disregard respondent's allegations that petitioners "knew of," "condoned," "approved of" and/or "designed" (Pet. App. 172a-173a, 190a) an unconstitutional policy: *dicta* in *Crawford-El*, 523 U.S. at 597-98; the adoption of an objective standard for qualified immunity in *Harlow*, 457 U.S. at 815-18; and the Court's application of traditional pleading standards in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). None of these sources, however, supports petitioners' argument.

Crawford-El does not even address relevant pleading standards, or the relationship between pleading standards and qualified immunity. Rather, the Court considered and forcefully rejected a heightened *burden of proof* that lower courts had imposed on civil rights plaintiffs in cases where the motive of the defendant was an element of the cause of action, leaving the imposition of any such heightened standard to the rule-making and legislative processes. 523 U.S. at 592-594. To the extent that a defendant believes that there is insufficient factual pleading in a complaint, the *Crawford-El* Court stated in *dicta*:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may . . . grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.

Id. at 597-598 (internal quotation marks omitted).

Petitioners misleadingly quote from only the last sentence of this paragraph, Br. for Petrs. 21, so as to sever *Crawford-El*'s dicta from its Rule 12(e) context. And even if petitioners' reading of the language used in *Crawford-El* were correct, it could not be squared with this Court's later decision in *Swierkiewicz*, which unlike *Crawford-El* was decided at the pleading stage. 534 U.S. at 514-15. If anything, however, *Crawford-El* confirms that the Federal Rules already take account of the concerns expressed here by petitioners, and that an adjustment of pleading standards is unnecessary. Notably, petitioners have for-

gone numerous opportunities to seek a more definite statement pursuant to Rule 12(e). Pet. App. 26a. Petitioners thus have declined to take advantage of the protective mechanisms suggested by *Crawford-El*'s dicta.

Petitioners' reference to this Court's adoption of an objective standard for qualified immunity also does not advance their argument. When this Court abandoned the "good faith" immunity standard of *Wood v. Strickland*, 420 U.S. 308 (1975), it did so because of concerns that the good faith immunity standard could be easily evaded through artful pleading. *Harlow*, 457 U.S. at 817-19. That the Court responded to this concern by adjusting its qualified immunity standard, *rather than* the liberal pleading standard, only confirms the general rule that pleading rules are governed by the Federal Rules and not by the Court's assessment of various policy concerns. Here, the concerns that motivated the Court to adopt an objective standard have been fully incorporated by the Second Circuit's decision. Pet. App. 13a-14a, 29a, 59a. Petitioners' conduct, as alleged in the complaint, was judged by its objective conformity with clearly established law. *Id.* That petitioners nonetheless may have to respond to limited discovery requests does not eviscerate their entitlement to assert qualified immunity. *Id.* 27a.

This leaves petitioners' reliance on *Bell Atlantic*, but that case did not alter these fundamental rules. *Bell Atlantic* reaffirmed *Swierkiewicz* and with it the rejection of any heightened pleading standards imposed by judicial fiat. *Bell Atlantic*, 127 S. Ct. at 1973-1974 & n.14. Rather than require detailed fact pleading, the Court simply held that the facts alleged, taken as true, have to plausibly suggest the

right to relief. *Id.* at 1964, 1973 n.14. *Bell Atlantic*'s "plausibility" requirement has particular force where a complaint alleges facts that are consistent with both legal and illegal conduct. *Id.* at 1972-1973. The case does not suggest, however, that the facts necessary to state a claim are to be adjusted based on the status of a defendant, the fact that a plaintiff is bringing a constitutional tort claim, or to take account of an affirmative defense.

The *Bell Atlantic* Court contrasted its description of Rule 8's pleading standard with what it admitted was one extreme reading of language from *Conley v. Gibson*, 355 U.S. 41 (1957), which suggested that a complaint could not be dismissed if a court could imagine any set of facts, whether alleged in the complaint or not, that could support the claims for relief. *Id.* at 1968-1969. Instead of leaving such matters to a court's imagination, *Bell Atlantic* held that claims must be supported by facts alleged in the complaint, even if they may be proven by other facts developed through discovery. *Id.* at 1969. Thus, *Bell Atlantic* disclaimed any intention to radically alter the Rule 8 pleading standard; rather, it announced the retirement of a phrase from *Conley* that few lower courts had taken literally and that was "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Id.*

Bell Atlantic's holding must also be understood in light of the antitrust conspiracy claim it addressed, in which the Court confronted a particular factual dilemma in resolving a motion to dismiss antitrust conspiracy claims: the impossibility of distinguishing lawful parallel conduct from unlawful conspiratorial conduct, absent the allegation of *some* fact that indicates conspiracy. *Id.* at 1964. The allegations in *Bell*

Atlantic were deemed implausible not because the Court suspected that they were not true, but because the complaint on its face made clear that the inference of conspiracy was drawn entirely from lawful parallel conduct, an inference that is not permitted under substantive antitrust law. Thus, *Bell Atlantic* did nothing to disturb the well-settled rule that a complaint must survive a motion to dismiss so long as the factual allegations, taken as true, are not "a formulaic recitation of the elements of a cause of action" and "raise a right to relief above the speculative level." *Id.* at 1965. Moreover, a court may not look behind factual allegations and decide whether "actual proof of those facts is improbable." *Id.*

Unlike *Bell Atlantic*, it cannot be argued here that the allegations against petitioners are consistent in any way with lawful conduct. Indeed petitioners concede that an allegation the petitioners knew and acquiesced in discriminatory conduct, or directed the conduct themselves, would state a claim that the constitution was violated. Br. for Petrs. 44-45. Their only quarrel with the decisions below is its holding that the complaint adequately connected petitioners to these allegations. In this context, *Bell Atlantic* adds little to the picture.

Nor is there the prospect here, as in *Bell Atlantic*, that the burdens of discovery will overwhelm petitioners. The United States, which continues as a defendant under respondent's FTCA claims, has produced the bulk of documents to date, the most burdensome aspect of discovery in this case. The only realistic burden for petitioners is the possibility of a deposition, but under the Second Circuit's decision even that will only take place if preliminary discov-

ery provides respondent with grounds to seek such a deposition. Pet. App. 26a-27a.

This is simply not the case where the defendants will be pressured into settling an meritless case because of the burdens of discovery. If such pressure were thought to exist, they would likely have emerged before participation by the Government in numerous depositions and extensive document production. The Government's settlement for $300,000 of one claim raising essentially the same allegations as respondent refutes the disingenuous suggestion by petitioners and their amici that the claims advanced here are "insubstantial." Br. for Petrs. 20; Br. *Amici Curiae* of William P. Barr, et al., at 12. Similarly, petitioners' and their *amici*'s protests that the Second Circuit's decision will result in a rush to sue high-ranking officials falls flat when one considers that the only support offered for this proposition is a hearsay recounting of the experience of Attorney General Levi. Br. for Petrs. 41. Notably, even that account does not suggest that General Levi ever was subjected to discovery, even under pre-*Bell Atlantic* pleading standards, and no reported case indicates that he was ever burdened by discovery. *See, e.g. Burrascano v. Levi*, 452 F. Supp. 1066 (D. Md. 1978).

Petitioners suggest that the Court should inquire whether it is likely that respondent will be able to show that petitioners intended to discriminate. Br. for Petrs. 34-35. But in the absence of a specific heightened pleading requirement, "ordinary pleading rules are not meant to impose a great burden." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The Rule 8 standard is satisfied if a complaint gives "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

Swierkiewicz, 534 U.S. at 512 (internal quotation marks omitted). "Fair notice" is that which will enable the defendant to answer and prepare for trial. 5 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1215 (3d ed. 2004). In a garden variety negligence action, for example, it is sufficient to state that on a given date and a given place, "defendant negligently drove a motor vehicle against plaintiff." Fed. R. Civ. P. Form 9 (cited with approval by *Bell Atlantic*, 127 S. Ct. at 1970 n.10). In the more closely analogous Title VII context, it is sufficient to allege that an adverse employment action was taken "on account of" prohibited factors. *Swierkiewicz*, 534 U.S. at 514. Thus, under Rule 8, a complaint need not identify the exact nature or mechanism of the defendant's misfeasance to state a claim. And, critically, to the extent a complaint alleges a defendant's state of mind, such as knowledge or intent, it may be averred "generally," without any subsidiary facts. Fed. R. Civ. P. 9(b).

That *Bell Atlantic* worked no significant change to Rule 8 pleading standards is evidenced by the Court's per curiam disposition of a Section 1983 complaint in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). In *Erickson*, the lower court had dismissed a prisoner's claim of deliberate indifference to serious medical needs because the prisoner had failed to allege that he suffered any particular harm as a result of a denial of medical treatment. *Id.* at 2199. The Court reversed this disposition, finding that an allegation that the denial of care was endangering the prisoner's life was sufficient, without more, to state a claim. *Id.* at 2200. In so doing, the Court reemphasized that such a contention, albeit lacking specifics, was not "too conclusory" to provide fair notice of the

substance of the claim, that "[s]pecific facts are not necessary," and that all factual allegations in the complaint must be taken as true at the motion to dismiss stage. *Id.* (citing *Bell Atlantic* and *Swierkiewicz*). Although a qualified immunity defense was available to the defendant in *Erickson*, the Court did not apply a different pleading standard in evaluating the complaint.

Erickson also confirms that *Bell Atlantic* did not alter *Swierkiewicz*'s essential holding that the requirements of notice pleading are minimal. Reviewing a pleading alleging discriminatory conduct, *Swierkiewicz* held that it is sufficient to allege that a plaintiff suffered an adverse employment consequence (the "what"), the events leading to that adverse consequence (the "when"), the identities and protected-class status of some of the individuals involved (the "who"), and that the defendant took the adverse employment action "on account of" a plaintiff's protected class status. 534 U.S. at 514. The Court found these allegations sufficient, even though it acknowledged that its holding could result in some complaints with "conclusory" allegations advancing to discovery. *Id.*

With this understanding of *Swierkiewicz* in mind, the complaint in the instant case easily alleges the what, when, who, and where elements: (1) the "what" for these petitioners is the policy of categorizing detainees as "of interest" and "of high interest" based solely on their protected class status; (2) the "when" is the period that respondent was subjected to discriminatory classification and treatment; (3) the "who" are each of those individuals involved in different ways in respondent's confinement in the ADMAX SHU; (4) and the "where" is both Washington,

D.C. and New York City. Pet. App. 164a, 168a, 169a, 172a, 173a (Compl. ¶¶ 48, 49, 69, 81, 96, 97.). As such, the complaint meets the standards set forth in *Swierkiewicz*, and by extension, *Bell Atlantic*.

Petitioners would fault respondent for not having access at the time of filing to additional information establishing petitioners' liability, but the motion to dismiss standard does not require such particularity. *Bell Atlantic*, 127 S. Ct. at 1964 (not requiring "detailed factual allegations"). Insisting on such specificity here is particularly disingenuous, because petitioners and their codefendants found the complaint specific enough to lay blame for the conduct alleged therein at the feet of other defendants. For instance, petitioner Ashcroft argued in the district court that lower level MDC officials were not responsible for the placement of respondent in restrictive conditions of confinement because that decision "was driven by national security and foreign threat concerns which wardens and prison officials were in no position to second guess." (Ashcroft District Ct. Br. at. 13 (*cited* at App. 118a)). Petitioner Ashcroft would apparently now argue that, not only were such decisions not made at the lowest levels of the MDC, they also were not made at the highest levels of the Department of Justice, placing responsibility squarely on his codefendants Rolince and Maxwell. Br. for Petrs. 32-33. Petitioners' ability to assign blame undermines any argument that they do not "know what to answer" in responding to respondent's complaint, the ultimate purpose of the notice required by the Federal Rules and reaffirmed by *Bell Atlantic*. 127 S. Ct. at 1270 n.10. In *Bell Atlantic*, by contrast, the plaintiffs alleged a conspiracy that formed over several years and that involved several large corporations – in that

context, the Court noted that a defendant seeking to answer the complaint "would have little idea where to begin." *Id.*

At the same time, petitioners' codefendants have pointed fingers at each other in disclaiming responsibility for the discriminatory policies challenged here. (*See* Rolince Appellate Br. 24-25, 29-30; Sawyer Appellate Br. 27-28; Hasty Appellate Br. 42-44.). Yet petitioners—who have far more control over respondent's access to information than do most defendants—expect respondent to discern, prior to discovery, the precise roles and responsibilities exercised by each defendant when they themselves have substantial disagreements.

Indeed, the Court's consistent refusal to alter the liberal pleading requirements of Rule 8 as petitioners now request is particularly salient here, where there is such a profound informational asymmetry. Of the thousands of documents produced in this litigation to date by the Government, every one has been classified confidential, subject to a protective order, and would presumably have been unavailable to Mr. Iqbal prior to filing his complaint. Moreover, there is evidence that policies related to the one challenged in this case were never reduced to writing, and therefore the only means of discovering them is through interrogatories or depositions. *OIG Report* at 37-38 (stating that "hold until cleared" policy did not exist in writing, even though it originated from petitioner Ashcroft). At the same time, in the lower courts, defense counsel have suggested that petitioner Ashcroft authored a memorandum to subordinates such as Michael Rolince, also a defendant in the instant case, outlining how the classification system at issue in this litigation was to be carried out. (*See* Tr. Of

4/28/08 Status Conference at 19, Docket No. 539). Without the discovery process, respondent would have no ability to lawfully obtain any of this information. It is presumably for this reason that this Court recognized in *Crawford-El* the well-established principle that discovery is the proper means for plaintiffs to amplify allegations in a complaint. 523 U.S. at 599-600. The teachings of *Bell Atlantic*, *Swierkiewicz*, and *Crawford-El* therefore confirm rather than conflict with the Second Circuit's decision in this case.

Even if petitioners could overcome the substantial barriers posed by precedent and the Federal Rules, their proposed new rule is fundamentally ill-advised. The uncertainty inherent in this proposed rule is most evident in the possible interpretations of "high-ranking" official. For instance, although petitioners claim that their proposed rule fairly distinguishes between their own status and the status of their co-defendants, their codefendants themselves seek to take advantage of the rule in this very proceeding. *Compare* Br. for Petrs. 33 n.4 *with* Br. for Respondents Rolince and Maxwell 5 *and* Br. for Respondent Hasty 10-11.

Moreover, petitioners' justification for a defendant-specific heightened pleading standard rests in part on the fact that they oversee large federal agencies and have many responsibilities. Br. for Petrs. 27-28, 36-37. Presumably, similar arguments could be made on behalf of officials who oversee large federal agencies, or wardens who oversee large prisons, as opposed to those who supervise small agencies or prisons. If the Court were to adopt petitioners' rule, lower courts and litigants would have little guidance

as to how to assess pleadings involving such individuals for compliance with Rule 8.

C. THE SECOND CIRCUIT PROPERLY FOUND THAT RESPONDENT'S COMPLAINT ADEQUATELY ALLEGES PETITIONERS' PERSONAL INVOLVEMENT

Respondent's complaint easily satisfies the well-settled rules governing pleading that have been enunciated by this Court. The complaint gives sufficient notice to petitioners as to the nature of respondent's claims, and each of the allegations made against petitioners can be admitted or denied without the pleading of any additional subsidiary facts.[6] Moreover, the complaint establishes an entitlement to relief against petitioners based on two independent theories of supervisory liability: (1) petitioners' creation of a discriminatory policy of classifying detainees based on their race, religion, and national origin; and (2) petitioners' knowledge and acquiescence in their subordinates' use of discriminatory cri-

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[6] Respondents Hasty, Rolince, and Maxwell have each argued that the complaint also fails to sufficiently allege their involvement in the unlawful conditions of confinement imposed upon respondent. Br. for Respondent Hasty 20-21; Br. for Respondents Rolince and Maxwell 9-10. None of these arguments is cognizable here, as the questions presented are limited to whether the lower courts properly determined that respondent had adequately alleged claims against *petitioners*. Respondents Rolince and Maxwell have not even petitioned for certiorari in this Court, and while Sup. Ct. Rule 12.6 permits them and respondent Hasty to file briefs in support of petitioners, no Rule permits respondents to expand the questions presented to the Court so as to encompass the sufficiency of the allegations made against each respondent individually.

teria to make classification decisions among detainees. Importantly, the first question presented, and petitioners' arguments directed thereto, only relate to the second theory of liability. Thus, even if the Court agrees with petitioners that the complaint does not state a cause of action as to the second theory of liability, the Second Circuit's holding that respondent states a claim as to the first will survive.

To understand how the complaint adequately alleges *Bivens* claims against petitioners, it is important to note the many areas of agreement among the parties as to the substantive law governing supervisory *Bivens* liability. First, it is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*. Second, and relatedly, all agree that a supervisor must take some affirmative act (or legally actionable omission) that contributes to or causes the constitutional violation alleged by a plaintiff. Pet. App. 14a. Third, petitioners agree that a supervisor's knowing acquiescence to subordinates' unconstitutional conduct is enough to establish supervisory liability. Br. for Petrs. 44-45; Pet. 29-31. Finally, if a supervisor takes affirmative steps to create a facially unconstitutional policy, to be applied by subordinates, this too will establish supervisory liability. *Cf. Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992).

With these principles in mind, under the longstanding pleading rules described above, the complaint in the instant case adequately alleges petitioners' personal involvement in the unconstitutional conduct that is the subject of the complaint. Petitioners attempt to micharacterize the decision below and the complaint in several ways: (1) by arguing that respondent alleged only that petitioners estab-

lished a general policy of holding "high interest" detainees in restrictive conditions of confinement, but not that petitioners established a policy to discriminate on the basis of race, religion, and national origin, Br, for Petrs. 30; (2) by implying that petitioners can only be held liable if they were personally involved in the specific decision to classify respondent as of "high interest," Br. for Petrs. 31, 37; and (3) by characterizing respondent's allegations as to petitioners' knowledge and intent to discriminate as "conclusory." Br. for Petrs. 32. Each of these contentions is inconsistent with the plain language of the complaint, read in light of the pleading rules discussed above:

- Petitioner Ashcroft was the "principal architect" of the policies challenged in this lawsuit. Pet. App. 157a (Compl. ¶ 10).
- Petitioner Mueller was "instrumental in the adoption, promulgation, and implementation" of the challenged policies. *Id.* (Compl. ¶ 11).
- From its inception, the September 11 investigation targeted men based on their race, religion, and national origin. *Id.* 164a (Compl. ¶ 47).[7]

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[7] This was consistent with other Government policies after September 11 which targeted Arab, South Asian, and Muslim individuals for categorical suspicion. *See* Asian American Legal Defense and Education Fund Report, *Special Registration: Discrimination and Xenophobia as Government Policy*, January 2004, available at <http://www.aaldef.org/images/01-04_registration.pdf>.

- Respondent and others were classified as "of high interest" to the September 11th investigation solely "because of [their] race, religion, and national origin . . . and not because of any evidence of [their] involvement" in terrorism. *Id.* (Compl. ¶¶ 48, 49).
- Petitioners "approved" the policy of holding "high interest" detainees in highly restrictive conditions of confinement until "cleared" by the FBI. *Id.* 168a (Compl. ¶ 69).
- Petitioners "knew," "condoned," and "agreed" that respondent and others like him be subjected to these harsher conditions of confinement "as a matter of policy, solely on account of their religion, race, and/or national origin." *Id.* 172a (Compl. ¶ 96).
- Petitioners "willfully . . . designed" a policy of confining individuals like respondent in the ADMAX SHU for these arbitrary reasons. *Id.* 173a (Compl. ¶ 97).
- Petitioners "adopt[ed]," "promulgat[ed]," and "implement[ed]" a policy and practice of imposing harsher conditions of confinement on respondent and others because of respondent's religious beliefs, *id.* 201a, 206a (Compl. ¶¶ 232, 247), race, *id.* 202a, 208a (Compl. ¶¶ 235, 250), and national origin, *id.* 208a (Compl. ¶ 250).

The cited language shows that respondent alleged that petitioners were personally responsible for the discriminatory policy of classifying Arab and Muslim detainees as "high interest" solely because of their race, religion, and national origin—the complaint alleges that "high interest" detainees were classified as such for discriminatory reasons, that "high interest" detainees were confined in the ADMAX SHU, and that petitioners approved of respondent and others like him being confined in the ADMAX SHU because of his race, religion, and national origin. The Second Circuit correctly held that these allegations establish respondent's claim that he was kept in harsh conditions of confinement solely because of discrimination and that petitioners, among others, targeted respondent for mistreatment-because of his race, religion and national origin. Pet. App. 59a. Additionally, the Second Circuit properly interpreted these allegations as stating that respondent specifically alleged that petitioners both condoned and agreed to this discrimination, and that no further subsidiary facts need be alleged. Pet. App. 62a.

Thus, respondent has not alleged that petitioners personally classified Mr. Iqbal, but instead that Mr. Iqbal's classification was a result of petitioners' categorical policy of discrimination on the basis of race, religion, and national origin. If any further confirmation were needed, one need look no further than the arguments petitioners themselves made below. In their brief before the Court of Appeals, petitioners acknowledged the complaint's allegation that petitioners "adopted and implemented a 'policy and practice of imposing harsher conditions of confinement' on plaintiffs because of their religious beliefs or race," and adopted the policy of holding detainees in

the ADMAX SHU until they were "cleared" by the FBI because of discriminatory animus. (Opening Appellate Br. for Petitioners at 47-48).

Petitioners argued below that these allegations should be rejected, not because the complaint only alleged petitioners' *knowledge* of misconduct (as petitioners argue for the first time here), but for two different reasons: (1) that the allegations as to discriminatory animus were "patently absurd"; and (2) that one should expect that those suspected of involvement in September 11 would share the "religious and national origin background" of the attackers. *Id.* Petitioners' first argument requires the assumption that individuals in high positions of authority never discriminate, an assumption that is inappropriate at this stage of the proceedings and belied by the facts alleged in the complaint. Petitioners' second argument, which they repeat here, Br. for Petrs. 34-35, is a remarkable concession to unlawful discrimination. And in any event, it is essentially an argument that their discriminatory policy was justified under the circumstances, a premature argument that is most appropriately introduced at the summary judgment stage to establish that a compelling state interest justified discrimination. *Johnson v. California*, 543 U.S. 499 (2005) (placing burden on prison to establish necessity for racial classification).[8]

All that remains is petitioners' argument that the complaint's allegation of knowledge of and agree-

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[8] Thus, petitioners' reference to the scale of the September 11 investigation is improper. Br. for Petrs. 36-37. Those facts are not contained in respondent's complaint, and at best are relevant at a later stage in the proceedings, when petitioners seek to establish that their policy was justified or objectively reasonable.

ment to create the discriminatory policy is a "conclusory" allegation that the Court is not bound to accept as true at the motion to dismiss stage. Br. for Petrs. 32. The difficulty with this contention is that Rule 9(b) specifically allows states of mind to be averred generally. The complaint alleges that petitioners agreed to subject respondent and other like him to particular conditions of confinement in the ADMAX SHU solely because of their religion, race and national origin and not for any legitimate reason. Pet. App. 172a (Compl. ¶ 96). The complaint further alleges that petitioners implemented a policy and practice of imposing harsher conditions of confinement on respondent and others because of their religion and race. Pet. App. 201a-202a (Compl. ¶¶ 232, 235). These are facts under Rules 8 and 9(b)—not legal conclusions—that establish respondent's claim of unlawful discrimination. Unlike the allegation of conspiracy in *Bell Atlantic*, petitioners here can answer each of these allegations quite precisely—they either did or did not know of the discriminatory policy, and they either did or did not agree with the policy. This is far from a conclusory statement such as "Defendants violated plaintiff's Fifth Amendment rights" which, like the allegations in *Bell Atlantic*, would leave a defendant with nowhere to begin in preparing an answer. 127 S. Ct. at 1270 n.10.

Petitioners also attempt to limit the reach of respondent's complaint by claiming that the complaint only seeks to establish liability against them based on the "alleged illegal conduct of a lower-level officer." Br. for Petrs. 28-29. This conveniently ignores those aspects of respondent's complaint which allege that petitioners themselves behaved unconstitutionally by designing the policy of treating detainees dif-

ferently based on their race, religion, and national origin. Pet. App. 172a-173a. Such allegations do not rely on the alleged illegal acts of subordinates, except to the extent that respondent needs to establish that he was treated discriminatorily in order to establish damages. Indeed, under the Equal Protection Clause, the discriminatory classification itself, with the possibility that it would lead to harmful consequences, is sufficient to establish a cognizable injury, as this Court held in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2750-51 (2007). Nor can the Court accept petitioners' suggestion that, simply because lower level employees had responsibility for carrying out their unconstitutional policy, petitioners are immune from liability for creating the policy. Petitioners might be arguing instead that respondent is barred by *Bell Atlantic*'s "plausibility" analysis from pleading claims in the alternative. But *Bell Atlantic* cannot reach so far as to displace Rule 8(d)'s contemplation that claims may be pleaded in the alternative, even if inconsistent with each other.[9]

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[9] Petitioners highlight respondent's allegation that "[i]n many cases," the "high interest" designation was based on race, religion, and national origin, as if this undermines the discriminatory nature of the classification. (Petrs.' Br. 30.) But a plaintiff alleging discrimination need not establish that *every* decision made by a defendant reflected discriminatory animus in order to establish that discrimination pervaded the relevant acts challenged by the plaintiff. The allegation that the discriminatory classification occurred in many cases simply reflects that, on some occasions, classifications were made by lower level employees which reflected an actual belief that there was a connection between a detainee and terrorism. This only happened, however, in those cases when there was no need to rely on the blanket policy that Muslims, Arabs, and South Asians were presumptively suspicious. Respondent's complaint

Nor is anything established by petitioners' recognition that both the "of interest" and the "of high interest" designation were pervaded by discrimination. As the OIG Report demonstrated, and as alleged in the complaint, there was no relevant difference between the groups categorized as "of interest" and "of high interest." *See OIG Report* at 70. Both groups were selected because of discriminatory policies, and it is no answer for petitioners to say that the discrimination in selecting "of interest" detainees immunizes the discrimination inherent in the "of high interest" classification. At best, petitioners might argue that it was the "of interest" classification which was discriminatory, and the "of high interest" classification which was random and arbitrary. But even if that were true, the initial classification as "of interest," stemming as it did from an unconstitutional policy created by petitioners, is nonetheless actionable. This Court's decision in *Parents Involved* clarifies that, where a discriminatory classification creates even the "possibility" that the individual so classified will be treated differently, Equal Protection concerns are triggered. 127 S. Ct. at 2750-51; *see also id.* at 2796-97 (Kennedy, J., concurring in part and concurring in the judgment).[10]

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makes clear that he was classified as of "high interest" because of his protected class status and not any legitimate reason. Pet. App. 164a (Compl. ¶49).

[10] Petitioners' contention that investigators were right to focus on "individuals . . . who bore characteristics similar to the September 11 highjackers," (Petrs.' Br. 31) merits a brief response. Putting aside whether it is permissible for investigators to rely solely on protected characteristics in *conducting an investigation* such as this, the question here is whether it is permissible to presumptively suspect such individuals of involvement in terrorism, and thereby *subject them to restrictive condi-*

Petitioners imply that the Court of Appeals disregarded *Bell Atlantic* by relying on the discovery process to weed out "a claim just shy of a plausible entitlement to relief." (Petrs.' Br. 26.) The Court of Appeals never stated that it was relying on the discovery process to buttress respondent's otherwise insufficient allegations against petitioners. To the contrary, the Court of Appeals correctly found that the allegations stated a plausible claim for relief, Pet. App. 62a, and cabined discovery so as to preserve as much as possible petitioners' entitlement to qualified immunity, *id.* 26a-27a. This approach is fully consistent with the Court's precedents. Indeed, given the daily involvement of petitioners in matters concerning the investigation and detention of September 11th detainees, *OIG Report* at 39-40, it is virtually inconceivable that petitioners were not involved in the wide-ranging and politically significant decision that detainees of a particular race, religion, and national origin were automatically considered "of high interest" to the September 11th investigation.

Petitioners also attempt to draw an unsupported link between the need to assess qualified immunity claims in light of the "specific context of the case," *Saucier*, 533 U.S. at 201, and the interpretation of some lower courts that *Bell Atlantic* calls for a context specific application of pleading standards. Br. for Petrs. 27. Of course, when *Saucier* referred to the "specific context" of a case, it was referring to determining the appropriate level of generality at which to judge "clearly established" law. 533 U.S. at 201.

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tions of confinement, absent any indication *other* than their protected characteristics. An allegation that these classifications were made for no legitimate purpose states an Equal Protection claim. *See, e.g., Johnson*, 543 U.S. at 505-08.

And the only Court of Appeals decision cited by petitioners in support of their contention that the context of this particular case should influence the interpretation of the complaint, *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008), only highlights the sufficiency of the pleadings contained in respondent's complaint. In *Robbins*, the complaint failed to identify which acts were attributable to which defendants, 519 F.3d at 1250, unlike in this case. Moreover, the facts alleged in *Robbins* "provide[d] no suggestion as to what the grounds for an equal protection violation might be." *Id.* at 1252-53. The same cannot be said here, where petitioners have understood from the inception of the lawsuit the grounds for the equal protection violation alleged by respondent.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for want of appellate jurisdiction or, in the alternative, affirm the decision below.

Respectfully submitted,

ALEXANDER A. REINERT
Counsel of Record
JOAN M. MAGOOLAGHAN
ELIZABETH L. KOOB
KOOB & MAGOOLAGHAN
221 DeVoe Avenue
Yonkers, New York 10705
(914) 964-8888

DAVID J. BALL
RIMA J. OKEN
JENNIFER BRACE
ETAI LAHAV
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8323

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RESPONDENT'S BRIEF

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No. 07-1015

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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General, *et al.*,
Petitioners,

v.

JAVAID IQBAL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS MICHAEL ROLINCE, Former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division, and KENNETH MAXWELL, Former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation IN SUPPORT OF REVERSAL

LAUREN J. RESNICK
FERNANDO A. BOHORQUEZ, JR.
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4200

THOMAS D. WARREN
KARL FANTER
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, OH 44114-3485
(216) 621-0200

Attorneys for Michael Rolince

LESLIE R. CALDWELL
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
(212) 309-6260

BRETT M. SCHUMAN*
MORGAN, LEWIS & BOKIUS LLP
One Market, Spear Street Tower
San Francisco, CA 94105
(415) 442-1000

Attorneys for Kenneth Maxwell

* *Counsel of Record*

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QUESTIONS PRESENTED

I. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

II. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

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STATEMENT OF THE CASE

This action was filed by plaintiff-respondent Javaid Iqbal ("Iqbal"), a citizen of Pakistan, seeking compensatory and punitive damages because of his alleged mistreatment at a federal detention facility following his arrest in New York City after the events of September 11, 2001. Iqbal was arrested by federal officials on November 2, 2001 and later confined at the Metropolitan Detention Center ("MDC") in Brooklyn. (First Amended Complaint ("Cmplt.") ¶¶80-81.) A criminal complaint was filed against Iqbal on November 5, 2001, charging him with conspiracy to defraud the United States and fraud in connection with identification documents (violations of 18 U.S.C. §§ 371 and 1028). *Iqbal v. Hasty*, 490 F.3d 143, 148 n.1 (2d Cir. 2007).

While at the MDC, Iqbal was initially housed with the general prison population. On January 8, 2002, he was transferred to the Administrative Maximum Security Special Housing Unit ("ADMAX SHU") of the MDC. (Cmplt. ¶81.) Iqbal pled guilty to the charges against him on April 22, 2002, and was sentenced to a sixteen month prison term. *Iqbal*, 490 F.3d 149. Iqbal was reassigned to the general prison population at the end of July 2002. *Id.* Iqbal was released on January 15, 2003, and was later removed to Pakistan. *Id.* at 149.

In May 2004, Iqbal filed suit against multiple federal officials from several different agencies, including petitioners Ashcroft and Mueller. Among the other defendants were respondents Michael Rolince, former Chief of the Federal Bureau of Investigation's ("FBI") International Terrorism Operations Section,

Counterterrorism Division ("Rolince"), and Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, FBI ("Maxwell") (collectively, "the FBI Supervisors"). Iqbal sought to hold the officials personally liable for purported statutory and constitutional violations pursuant to the implied judicial right of action created by *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Iqbal does not challenge his arrest, detention, conviction, or deportation. Rather, Iqbal challenges his conditions of confinement while at the MDC.

With respect to the claims before this Court, Iqbal alleges that in the months after September 11, 2001, the FBI arrested and detained thousands of Arab Muslim men as part of its investigation of the terrorist attacks. (Cmplt. ¶47.) Many of those men were allegedly classified by the FBI as "of high interest" to the government's investigation of the events of September 11 based on their race, religion and national origin, not because of evidence of their "involvement in supporting terrorist activity." (*Id.* at ¶¶47-48.) The complaint also alleges that "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks – however unrelated the arrestee was to the investigation – were immediately classified as 'of interest' to the post-September 11th investigation." (*Id.* at ¶52.) Iqbal alleges that the FBI Supervisors "were responsible for making the initial determination as to whether detainees arrested within the New York area . . . were classified as 'high interest' to the government's investigation." (*Id.* at ¶50.)

"High interest" detainees were confined in the MDC's ADMAX SHU.[1] (*Id.* at ¶53.) While at the MDC, Iqbal alleges that he was badly mistreated. The complaint, however, does not allege that Ashcroft, Mueller or the FBI Supervisors participated in Iqbal's treatment at the MDC. It does allege – in conclusory fashion – that all of the defendants, including Ashcroft and Mueller, "were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement." (*Id.* at ¶195.) According to Iqbal: "Officials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC." (*Id.* at ¶73.)[2]

Iqbal's complaint asserted over twenty causes of action. Four claims remain against Ashcroft and Mueller: two *Bivens* claims that they violated his First Amendment and Fifth Amendment equal protection rights by subjecting Iqbal to harsh conditions of confinement based on Iqbal's religion and race (*Id.* at ¶¶231-36), and two Section 1985(3) claims that Ashcroft

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1. Iqbal also alleges that, after the detainees were transferred to the ADMAX SHU, the FBI Supervisors "failed to approve" the release of detainees to the general population "based simply on the detainees' race, religion, and national origin[.]" (Cmplt. ¶76.) The Second Circuit, however, did not treat these clearance allegations as relevant to the claims currently before this Court. Rather, the appellate court addressed those allegations in the context of Iqbal's due process claim, which it dismissed. *Iqbal*, 490 F.3d at 165-68.

2. This allegation necessarily excludes Maxwell, who was based in New York City, and does not identify Rolince, who was one of hundreds of officials at FBI Headquarters at the time.

and Mueller conspired to violate Iqbal's civil rights because of his religion and national origin. (*Id.* at ¶¶246-51.) Only the two *Bivens* claims remain against the FBI Supervisors.

The Second Circuit readily acknowledged that "some of the allegations in the Plaintiff's complaint, although not entirely conclusory, suggest that some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement[,]" *Iqbal*, 490 F.3d at 158. The court nonetheless partially denied Ashcroft, Mueller, and the FBI Supervisors' motions to dismiss based on qualified immunity.

The court stated that Ashcroft and Mueller could be personally liable for their subordinates' constitutional violations because of their supervisory capacity, even if they did not participate in the violation and were unaware that such a violation occurred, if Ashcroft and Mueller were "grossly negligent" in supervising their subordinates. *Id.* at 152, 175. Likewise, although the Second Circuit acknowledged that the FBI Supervisors were also supervisory officials, *id.* at 152, the court denied their motion to dismiss based on qualified immunity as well.

SUMMARY OF ARGUMENT

I. Conclusory allegations in a *Bivens* action that high-ranking supervisory officials had knowledge of and condoned the alleged constitutional violations of subordinates and others are insufficient to withstand a motion to dismiss based on qualified immunity. Iqbal's allegations regarding the supervisory liability of Ashcroft and Mueller are not plausibly supported by the facts alleged in his complaint, nor do the allegations demonstrate Iqbal's entitlement to relief.

High-ranking non-cabinet supervisory officials such as Rolince and Maxwell should be treated no differently. Because FBI officials are also subject to frivolous lawsuits, qualified immunity is as important to those supervisors as it is to cabinet-level officials. Iqbal's allegations against Rolince and Maxwell are based on their status as supervisory officials at the FBI, not on plausible allegations that they personally violated Iqbal's constitutional rights. The Second Circuit acknowledged that "[a]ll of the appealing Defendants are supervisory officials." *Iqbal*, 490 F.3d at 152. Indeed, other than the allegation that the FBI Supervisors were responsible for the high-interest designation, the allegations against the FBI Supervisors are the same as the allegations against Ashcroft and Mueller. Moreover, unlike the conclusory allegations against Ashcroft, there are no allegations that Rolince and Maxwell were responsible for the decisions of the BOP, the MDC, or their personnel.[3]

3. Of course, Iqbal's conclusory claims regarding Maxwell and Rolince, like those regarding Ashcroft and Mueller, are merely allegations, not statements of fact.

Under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), a plaintiff must provide "more than labels and conclusions" in his complaint to withstand a motion to dismiss, and "a formulaic recitation of the elements of a cause of action will not do[.]" *Id.* at 1964-65. While a plaintiff's factual allegations should be taken as true when ruling on a motion to dismiss, a court is not required to accept a "legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Similarly, the Court also has stated that a plaintiff should be required to "put forward specific, nonconclusory factual allegations" to withstand a prediscovery dispositive motion based on qualified immunity. *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

Iqbal's complaint fails to meet this standard. As the Second Circuit acknowledged, Ashcroft and Mueller are high-level government officials "against whom broad-ranging allegations of knowledge and personal involvement are easily made." *Iqbal*, 490 F.3d at 158. The same is true of Rolince and Maxwell. Qualified immunity is an immunity from suit, and this Court has already rejected the Second Circuit's direction to the district court to permit limited discovery as an unworkable approach. *Bell Atlantic*, 127 S. Ct. at 1967.

II. Established principles in analogous areas of civil rights law dictate the result here. The Court has rejected a constructive notice theory based on *respondeat superior* for purposes of Section 1983 actions against state officials. In *Rizzo v. Goode*, 423 U.S. 362 (1976), the Court required an "affirmative link" between

the supervisors' actions and the subordinates' misconduct. In other words, the supervisors' "own conduct" played "no affirmative part" in the alleged constitutional violations, such that the supervisors were not "direct[ly] responsib[le]" for the violations. *Id.* at 371, 376-377; *see also Monell v. Dep't of Soc. Servs. of New York City*, 436 U.S. 658, 694 n.58 (1978) (*Rizzo* held that "mere right to control" cannot support supervisory liability under Section 1983).

The Court also has rejected *respondeat superior* liability based on constructive notice when determining a local governmental entity's liability in a Section 1983 action. A rigorous standard of causation is required – at a minimum, a municipality must have acted with "conscious disregard" to the "known or obvious consequences " of its actions, that action must have reflected "deliberate indifference" to a known risk that a constitutional violation would occur, and there must be a direct causal link between the action and the alleged injury. *Bd. of County Comm'rs of Bryan County, Ok. v. Brown*, 520 U.S. 397, 407, 410, 411 (1997). This Court should require a standard for supervisory liability that is at least as rigorous as the standard for municipal liability. Without the requirement of actual knowledge, a supervisor's liability becomes mere *respondeat superior* liability.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Court held that supervisory prison officials were not liable in a *Bivens* action filed by a prisoner for being subjected to dangerous prison conditions in violation of the Eighth Amendment absent the officials' actual knowledge of inhumane conditions and their deliberate indifference to those conditions. *Id.* at 837.

The same principles should apply here. A high level governmental official should not be liable in a judicially implied *Bivens* action based on a theory of constructive notice or negligence with respect to his official responsibilities. Rather, in the absence of direct personal involvement in a constitutional violation, actual knowledge of a risk of unconstitutional conduct by a subordinate and deliberate indifference to that knowledge should be required to hold a supervisory official liable in a *Bivens* action. Any lower standard is equivalent to imposing vicarious or *respondeat superior* liability. This Court has never permitted such an action, and it should not do so now.

ARGUMENT

I. Conclusory allegations in a *Bivens* action that an official knew of, condoned, or agreed to subject a plaintiff to unconstitutional acts by a subordinate do not entitle a plaintiff to relief.

Iqbal's claims against the FBI Supervisors are not plausibly supported by the factual allegations in his complaint. In *Bell Atlantic*, this Court stated that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Id.* at 1964-65 (quoting *Papasan*, 478 U.S. at 287). "Factual allegations," in turn, "must be enough to raise a right to relief above the speculative level," *id.* at 1965, although a court is "not bound to accept as true a legal conclusion couched as a factual allegation" when ruling on a motion to dismiss. *Papasan*, 478 U.S. at 287. Recognizing the concerns

raised by actions against government officials in their personal capacity, the Court has also suggested, in the qualified immunity context, that a plaintiff "put forward specific, nonconclusory factual allegations" to survive a motion to dismiss or for summary judgment prior to discovery. *Crawford-El*, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)).

Like the allegations regarding Ashcroft and Mueller, Iqbal's broad conclusory allegations regarding the FBI Supervisors do not meet this "requirement of plausibility." *Bell Atlantic*, 127 S. Ct. at 1968. First, the complaint broadly alleges that the FBI Supervisors, by virtue of their positions, were "instrumental in the implementation of the policies and practices challenged here" (Cmplt. ¶¶12, 13), and that they "were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement." (*Id.* at ¶195.) Similarly, the complaint generally alleges that the FBI Supervisors "by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' [race and sincere religious beliefs] violated Plaintiffs' rights under the [First and Fifth Amendments]." (*Id.* ¶¶232, 235.) The Complaint does not allege the FBI Supervisors – any more than Ashcroft or Mueller – participated in actually creating the conditions of confinement.

Second, Iqbal alleges that all Arab Muslim men in the New York area who had been arrested on criminal or immigration charges were classified as "of high interest" by the FBI Supervisors "following an investigative lead into the September 11th attacks."

(Cmplt. ¶52; *see also id.* at ¶¶50-51.) The only alleged link between the "high interest" designation and the alleged unlawful conditions of confinement, however, is that unspecified "[o]fficials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC." (*Id.* at ¶73.) Iqbal does not allege that the FBI Supervisors played any role in the mistreatment he suffered while in custody of the MDC and the BOP.

Iqbal's allegations regarding the "high interest" designation do not plausibly show that Iqbal is entitled to relief against the FBI Supervisors. *See Bell Atlantic*, 127 S. Ct. at 1965 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."). Nor does Iqbal plead enough factual allegations, even taken as true, "to raise a reasonable expectation that discovery will reveal" evidence that the FBI Supervisors violated Iqbal's constitutional rights. *Id.* at 1965. The complaint does not allege any communications between the FBI Supervisors and the MDC or BOP. (Cmplt. ¶195.) *See generally Bell Atlantic*, 127 S. Ct. at 1971 n.10 (complaint's description of agreement did not give notice required by Rule 8 because "the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies"). Iqbal's allegations lack detail and simply rely on what Iqbal speculates the FBI Supervisors should have known by virtue of their alleged official responsibilities. (*See, e.g.*, Cmplt. ¶¶12, 13.) Indeed, there are no facts in Iqbal's complaint plausibly suggesting that Rolince and Maxwell were named as defendants other than because of their high-level supervisory positions at the FBI.

Although *Bell Atlantic* involved claims under the Sherman Act, its holding applies more broadly. Indeed, the Court specifically rejected its earlier broad pronouncement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Bell Atlantic*, 127 S. Ct. at 1969.

The Second Circuit reasoned that two cases decided before *Bell Atlantic* – *Crawford-El* and *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) – compelled the court to find Iqbal's conclusory allegations regarding the defendants' racial, ethnic, and religious discrimination and their knowledge and involvement in Iqbal's mistreatment sufficient to withstand a motion to dismiss. *Iqbal*, 490 F.3d at 175-76. The parties in *Crawford-El* and *Swierkiewicz*, however, alleged plausible actions taken by the defendants and provided notice to them regarding the alleged conduct giving rise to liability. There was no need to assert additional facts supporting improper intent.[4] *See Crawford-El*, 523 U.S. at 578-79, 579 n.1, 592 (alleging "specific incidents" of retaliatory conduct and specific statements demonstrating animus); *Swierkiewicz*, 534 U.S. at 508-09, 513-15 (plausibly

4. *Bell Atlantic* specifically rejected the argument that *Swierkiewicz* is contrary to *Bell Atlantic*'s holding. The Court stated that *Swierkiewicz* simply rejected a heightened pleading standard "by insisting that Swierkiewicz alleged 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Bell Atlantic*, 127 S. Ct. at 1973-74. In contrast, *Bell Atlantic* requires "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974.

alleging specific discriminatory acts in Title VII claim, including "detail[ing] the events leading to his termination, provid[ing] relevant dates, and includ[ing] the ages and nationalities of at least some of the relevant persons involved with his termination"). Here, in contrast, Iqbal pleads no specific actions affirmatively linking the FBI Supervisors to Iqbal's mistreatment at the MDC.

Moreover, as with Ashcroft and Mueller, the FBI Supervisors "are current or former members of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made." *Iqbal*, 490 F.3d at 158. Although the Second Circuit directed the district court to engage in limited discovery and provide the defendants "ample opportunity" to seek summary judgment, *id.* at 158-59, this Court rejected that approach in *Bell Atlantic*:

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. . . And it is self-evident that the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage . . .

Bell Atlantic, 127 S. Ct. at 1967 (internal quotations omitted); *see also Anderson v. Creighton*, 483 U.S. 635, 653 n.5 (1987) (threshold question of whether reasonable

officer could have believed his actions lawful must be answered before allowing even limited discovery); *Siegert*, 500 U.S. at 236 (1991) (Kennedy, J., concurring in judgment) (The "avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.").

Qualified immunity provides "immunity from suit," and is designed to minimize "the expenses of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *see also Scott v. Harris*, 127 S. Ct. 1769, 1774 n.2 (2007) (qualified immunity should be resolved "at the earliest possible stage in litigation" (internal quotation omitted)); *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (qualified immunity is "an *immunity from suit* rather than a mere defense to liability," and "an entitlement not to stand trial or face the other burdens of litigation") (emphasis in original) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Iqbal's complaint does not plausibly entitle Iqbal to relief against the FBI Supervisors, and they are accordingly entitled to qualified immunity.

II. A supervisory official may only be liable in a *Bivens* action if he has actual knowledge of a risk of unconstitutional conduct by his subordinates, he is deliberately indifferent to that knowledge, and an affirmative link exists between the supervisor's actions and the alleged constitutional violation.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. While this case involves claims against federal officials pursuant to the implied judicial right of action first allowed in *Bivens*, the qualified immunity analysis is identical to the qualified immunity analysis for 42 U.S.C. § 1983 claims against state and local governmental officials. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

For a government official to be liable for damages, the official must have violated a constitutional right, and that right must have been "clearly established." *Anderson*, 483 U.S. at 640. "Clearly established," in turn, means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

When performing a qualified immunity analysis, before determining whether a constitutional right was clearly established, a court "must first determine

whether the plaintiff has alleged the deprivation of an actual constitutional right at all[.]" *Wilson*, 526 U.S. at 609 (quoting *Conn. v. Gabbert*, 526 U.S. 286, 290 (1999)).

A. A government official is not personally liable under a *respondeat superior* theory.

What the plaintiff must plead, of course, is closely related to what the plaintiff must prove to prevail on his claims. This Court has never recognized an implied *Bivens* action against federal officials for *respondeat superior* or vicarious liability. Moreover, this Court has "responded cautiously" to any expansion of *Bivens*. *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988); *see, e.g.*, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597, 2605 (2007) (no *Bivens* action against employees of Bureau of Land Development; "in most instances we have found a *Bivens* remedy unjustified"); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (the Supreme Court has "consistently rejected invitations to extend *Bivens*"); *F.D.I.C. v. Meyer*, 510 U.S. 471, 484-85 (1994) (declining to extend *Bivens*; noting the purpose of *Bivens* is to deter "the officer" who "allegedly violated his rights").

> In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct.

Malesko, 534 U.S. at 70 (emphasis in original).

A constructive notice theory based on *respondeat superior* or vicarious liability for supervisors in Section 1983 actions – *Bivens*'s "analog to suits brought against state officials," *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) – has been rejected by this Court. In *Rizzo*, the plaintiffs brought a Section 1983 action against Philadelphia's mayor, city managing director, police commissioner, and two other police department supervisors alleging a "pervasive pattern of illegal and unconstitutional police treatment of minority citizens in particular and Philadelphia residents in general." 423 U.S. at 362. The "principal antagonists" of the police mistreatment were not named as defendants. Rather, only the supervisory defendants were named and "charged with conduct ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future." *Id.* at 367.

The record before the Court established several instances of the unnamed individual police officers violating citizens' constitutional rights, and that the police department's procedures may have had "a tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct." *Id.* at 368-69. But, notwithstanding that evidence, the Court reversed because "there was *no affirmative link* between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisors] express or otherwise *showing their authorization or approval* of such misconduct." *Id.* at 371 (emphasis added). The Court also rejected the "amorphous proposition[]" that the supervisors had a constitutional duty "to 'eliminate' future police

misconduct," absent "a showing of direct responsibility" for the police misconduct." *Id.* at 375-76. The claims were dismissed because the supervisor's "own conduct" played "no affirmative part" in the alleged constitutional violations. *Id.* at 377.

Thus, *Rizzo* "appear[ed] to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise" cannot support supervisory liability under Section 1983. *Monell*, 436 U.S. at 694 n.58.

Here, the "affirmative link" is even more tenuous than that in *Rizzo* – there is no serious contention that the FBI Supervisors controlled the operations of the BOP or the MDC. Iqbal's only allegation is that some unnamed BOP official relied on the FBI's "high interest" designation when determining whether to place detainees in the ADMAX SHU. (Cmplt. at ¶73.) This is not the type of "affirmative link" the Court required in *Rizzo*.

B. Municipalities may not be liable under a *respondeat superior* theory.

The Courts of Appeals have looked to municipal liability to determine whether a supervisory official may be liable in a Section 1983 or *Bivens* action. "The legal elements of an individual's supervisory liability and a political subdivision's liability . . . are similar enough that the same standards of fault and causation should govern." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994); *see also Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989) ("[W]e are confident that,

absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve.").

This Court has rejected *respondeat superior* or vicarious liability when determining whether liability attaches to local governmental entities in a Section 1983 action. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, *rigorous standards* of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 520 U.S. at 405 (emphasis added); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122 (1992) ("The city is not vicariously liable under § 1983 for the constitutional torts of its agents: It is only liable when it can be fairly said that the city itself is the wrongdoer."). "[A] municipality cannot be held liable *solely* because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1982 on a respondeat superior theory." *Monell*, 436 U.S. at 691 (emphasis in original); *see also Brown*, 520 U.S. at 403 (same).

Rather, "[t]he plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Brown*, 520 U.S. at 404. This requires that a plaintiff establish a "direct causal link" between the municipality and "the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *Brown*, 520 U.S. at 404 (same). "[A] court must carefully test the link between the policymaker's inadequate decision and the

particular injury alleged." *Brown*, 520 U.S. at 410; *see also Canton*, 489 U.S. at 391 (city's failure to train "must be closely related to the ultimate injury").

Municipal liability also requires a showing of deliberate indifference – that is, the municipality acted with "conscious disregard" to the "known or obvious consequences" of its actions. *Brown*, 520 U.S. at 407. "A showing of simple or even heightened negligence will not suffice." *Id.* Stated differently, a plaintiff must show that a municipality's action "reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Id.* at 411; *see also Canton*, 489 U.S. at 389 (municipality may be liable only "where a failure to train reflects a 'deliberate' or 'conscious' choice"). And although deliberate indifference is "tantamount to intent," inaction by a municipality in the face of an obvious substantial risk of harm, such as a "policymaker sit[ting] on his hands after repeated acts of subordinate officers," may also be "equivalent" to the intentional action required by the deliberate indifference standard. *Brown*, 520 U.S. at 410, 418-19. Adopting any standard of fault and causation less rigorous than deliberate indifference "would result in *de facto respondeat superior* liability," which has been rejected by this Court. *Canton*, 489 U.S. at 391-92; see also *Canton* at 393-94 (O'Connor, J., concurring in part and dissenting in part) (agreeing that deliberate indifference standard should apply and that any lower standard would "open municipalities to unprecedented liability under § 1983" (internal quotation omitted)).

Here, the Court should apply a standard for supervisory liability that is at least as rigorous as the standard for municipal liability – actual knowledge and deliberate indifference to that knowledge. The reason for having a rigorous standard is primarily the same – liability should be based on one's own culpable actions, not the actions of others.

C. Many circuits have required actual knowledge and deliberate indifference to that knowledge to state a *Bivens* or Section 1983 claim against a supervisory official.

The Seventh Circuit requires that a supervisory official who was not directly involved in the constitutional violation at issue must have actual knowledge of a subordinate's conduct to be liable under Section 1983. "Supervisors who are simply negligent in failing to detect and prevent subordinate misconduct are not personally involved." *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997). Rather, a supervisor will be liable if, "with knowledge of the subordinates conduct, approves of the conduct and the basis for it." *Id.* "The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." *Jones v. City of Chicago*, 856 F.2d 985, 992-93 (7th Cir. 1988). The Third Circuit also requires that a supervisor either directly participated in the constitutional violation or "had knowledge of and acquiesced in his subordinates' violations." *Baker v. Monroe Tp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995).

The Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits have also rejected constructive knowledge based on mere supervisory status or negligence as a basis for liability. *See, e.g., Atteberry v. Nocona General Hosp.*, 430 F.3d 245, 255 (5th Cir. 2005) ("The test for deliberate indifference is subjective, rather than objective, in nature because 'an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.'" (quoting *Farmer*, 511 U.S. at 836); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) ("At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers."; rejecting liability based on respondeat superior, "the right to control employees," or the mere failure to act); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) (supervisor liable if he "knew of the violations and failed to act to prevent them" (quoting *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989))); *Oona R.S. v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998) (supervisor must be "aware of a specific risk of harm to the plaintiff" (internal quotation omitted)); *Woodward v. City of Worland*, 977 F.2d 1392, 1399 n.10 (10th Cir. 1992) (actual knowledge "must be alleged and proved"); *Serna v. Col. Dept. of Corr.*, 455 F.3d 1146, 1154-1155 (10th Cir. 2006) ("Deliberate indifference requires that the official both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (internal quotation marks and citations omitted)); *Int'l Action Ctr. v. United States*, 365 F.3d 20, 28 (D.C. Cir. 2004) (Roberts, J.) (general failure to

act or negligence is insufficient; rather, the supervisor "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what might see" (quoting *Jones*, 856 F.2d at 992)).

D. The FBI Supervisors were not personally involved in, and had no actual knowledge of, the claimed statutory and constitutional violations.

Iqbal's complaint contains no allegations that Ashcroft, Mueller or the FBI Supervisors were personally involved in the alleged mistreatment that he endured at the MDC. He does not allege that Ashcroft, Mueller or the FBI Supervisors knew about but failed to prevent Iqbal's treatment by MDC and BOP officials. Nor does he allege that Ashcroft, Mueller or the FBI Supervisors designated Iqbal for administrative detention or directed the BOP to place Iqbal in the ADMAX SHU.

1. Iqbal seeks relief for his treatment at the MDC, not his alleged "high interest" designation.

A fair reading of Iqbal's claims for discrimination in violation of the First and Fifth Amendments is that they are based on his punitive conditions of confinement at the MDC, including confinement in the ADMAX SHU, not the initial high interest classification that allegedly was made by the FBI Supervisors.

> Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL . . . by adopting,

> promulgating, failing to prevent, failing to remedy, and/or implementing a *policy and practice of imposing harsher conditions of confinement on Plaintiffs* because of Plaintiffs' sincere religious beliefs violated Plaintiffs' rights under the First Amendment to the United States Constitution.

(Cmplt., ¶232).

This is how the Second Circuit read the complaint, too. The court held that the alleged high interest designation states a claim sufficient to survive a motion to dismiss based on qualified immunity only "*when combined* with the Plaintiff's allegation that, under the policy created and implemented by the Defendants, he was singled out for unnecessarily punitive conditions of confinement[.]" *Iqbal*, 490 F.3d at 175 (emphasis added). But there is no allegation the FBI Supervisors had anything to do with the policy or practice of imposing punitive conditions of confinement.

2. Iqbal fails to link the FBI Supervisors to his treatment at the MDC.

There is no affirmative link between the high interest designation and the alleged constitutional violations suffered by Iqbal. The pertinent allegations are as follows:

- The FBI Supervisors were "instrumental in the implementation of policies and practices challenged here" (Cmplt. ¶¶12, 13.)

- The FBI Supervisors were "aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement" (*Id.* at ¶195.)

- Unspecified FBI officials were aware that the BOP relied on the FBI's classification to determine whether to detain prisoners in the ADMAX SHU: "Officials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC." (*Id.* at ¶73.)

The first two allegations are general conclusory allegations of, at most, supervisory involvement. In any event, the complaint does not allege how high-level officials in a different agency could be "instrumental in implementing" the policies and practices of the BOP/MDC. Nor does the complaint allege, factually, how the FBI Supervisors "maliciously created" the conditions of confinement at issue when there is no mention of a single communication between the FBI Supervisors and the BOP or MDC.

The third allegation simply states that certain FBI officials were aware that the BOP relied on the high interest classification.[5] There is no allegation that the

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5. Moreover, the Second Circuit incorrectly interpreted Iqbal's complaint as alleging he was classified as high interest "solely" because of his race, ethnicity, and religion, *Iqbal*, 490 F.3d at 148, even though the complaint does not make that allegation. Rather, the complaint alleges Arab Muslim men

(Cont'd)

FBI Supervisors directed the BOP with respect to how high interest designees should be housed or treated. Alleging that the BOP relied on the FBI Supervisors' classification, and even alleging some unnamed FBI officials in Washington were aware of that reliance, is quite different from alleging facts plausibly showing how the FBI Supervisors are affirmatively linked to the punitive conditions of confinement endured by Iqbal.

Significantly, Iqbal does not allege that the FBI Supervisors had authority over, or were responsible for, the decisions or policies of the BOP, the MDC, or their personnel. *See Serna*, 455 F.3d at 1154 ("[F]ailure to supervise is only actionable under § 1983 against a defendant who had a duty to supervise."); *Hernandez v. Gates*, 100 F. Supp. 2d 1209, 1218 (C.D. Cal. 2000) ("To succeed on a claim of supervisor liability, plaintiff must establish that defendants were directly responsible for overseeing the performance of the wrongdoer."). Nor does Iqbal allege that the FBI Supervisors had access

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(Cont'd)

(1) "within the New York area," (2) who were "arrested on criminal or immigration charges," were so classified (3) only "while the FBI was following an investigative lead into the September 11th attacks." (Cmplt. ¶52.) The complaint plausibly alleges that, at most, Iqbal's race, ethnicity, or religion were factors in his high interest designation. In any event, such a classification is not unlawful, *cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975); *United States. v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982), especially given the context of the classification. As Judge Cabranes observed, these actions occurred during "a national and international security emergency unprecedented in the history of the American Republic." *Iqbal*, 490 F.3d at 179 (Cabranes, J., concurring).

to or knowledge of the underlying regulatory framework and prison procedures governing administrative detention. There are no allegations that the FBI Supervisors (or Ashcroft and Mueller) had any contact with prison officials concerning the conditions of Iqbal's confinement. Other than the "high interest" designation for investigative purposes, there was no direct or affirmative action by the FBI Supervisors with respect to the designation decisions of post-September 11 detainees.

In *Farmer*, the Court held that supervisory prison officials were not liable in a *Bivens* action filed by a prisoner for being subjected to inhumane prison conditions in violation of the Eighth Amendment absent the officials' actual knowledge of inhumane conditions and his deliberate indifference to those conditions. "[A] prison official cannot be found liable . . . unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must draw the inference." 511 U.S. at 837.

Similarly, to hold a supervisor personally liable in a judicially implied *Bivens* action the Court should require that a supervisor have actual knowledge of a risk of unconstitutional conduct by others, act with deliberate indifference to that risk, and an affirmative link must exist between the supervisor's inaction and the alleged constitutional violation. Holding supervisors liable simply because their official responsibilities may have given them constructive notice of their subordinates' actions – let alone the actions of officials in a separate

governmental agency over whom they do not have supervisory authority or control – is inconsistent with the decisions of this Court and the restraint traditionally exercised in interpreting *Bivens* actions.

3. Allowing actions against federal supervisory officials based on constructive knowledge is bad policy.

Permitting *Bivens* actions against high-level federal officials for what is effectively *respondeat superior* liability exposes officials to personal liability with little social benefit. An official without actual knowledge of potential wrongdoing cannot often meaningfully address or correct those issues. Moreover, it would be difficult for a high-level official to control the actions of lower level officials – especially those in a different agency. *See Iqbal*, 490 F.3d at 178 (Cabranes, J.) (concurring) ("But most, if not all, of the assertedly unlawful actions in [Iqbal's] complaint – including the decision to place plaintiff in the ADMAX SHU and the abuses which purportedly ensued there – are alleged to have been carried out by defendants much lower in the chain of command.").

"Competent persons could not be found to fill positions . . . if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person." *Robertson v. Sichel*, 127 U.S. 507, 515 (1888); *see also Harlow*, 457 U.S. at 814 ("Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most

irresponsible [public officials], in the unflinching discharge of their duties." (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

If constructive notice were all that was required, courts would be flooded with specious claims against high-ranking government officials. Indeed, as Judge Cabranes noted in his concurring opinion in the court below: "[L]ittle would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Iqbal*, 490 F.3d at 179.

Although Rolince and Maxwell obviously are beneath petitioners Ashcroft and Mueller, they are nevertheless high-level supervisory officials subject to claims predicated on constructive knowledge or responsibility for acts perpetrated by others. The importance of qualified immunity is just as crucial to the FBI Supervisors as it is to Ashcroft and Mueller.

CONCLUSION

Rolince and Maxwell respectfully request that this Court reverse the Second Circuit's decision affirming the district court's denial of Ashcroft and Mueller's and Rolince and Maxwell's motions to dismiss Iqbal's First Amended Complaint, and direct entry of judgment in favor of Ashcroft, Mueller, Rolince, and Maxwell.

Respectfully submitted,

LAUREN J. RESNICK
FERNANDO A. BOHORQUEZ, JR.
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4200

THOMAS D. WARREN
KARL FANTER
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, OH 44114-3485
(216) 621-0200

Attorneys for Michael Rolince

LESLIE R. CALDWELL
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
(212) 309-6260

BRETT M. SCHUMAN*
MORGAN, LEWIS & BOKIUS LLP
One Market,
Spear Street Tower
San Francisco, CA 94105
(415) 442-1000

Attorneys for Kenneth Maxwell

* *Counsel of Record*

REPLY BRIEF

No. 07-1015

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

GREGORY G. GARRE
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The court of appeals sustained the denial of petitioners' motion to dismiss on the ground of qualified immunity and thus held that the former Attorney General of the United States and current Director of the Federal Bureau of Investigation may be subjected to discovery and potentially a trial based on highly generalized and conclusory allegations that those high-ranking officials knew about, approved of, or condoned wrongs allegedly committed by federal officers much lower down on the bureaucratic chain of command. The court of appeals was unanimous in expressing reservation about that result. See Pet. App. 25a-27a. Judge Cabranes went further. He not only urged this Court to review its decisions in this area "at the earliest opportunity," but observed that the court of appeals' deci-

sion would supply a "blueprint" for "plaintiffs claiming to be aggrieved by national security programs and policies" to subject "officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 69a-70a (concurring opinion).

In his merits brief, respondent seems most interested in avoiding review of the important questions presented by this case. First, respondent implausibly asserts (Br. 1) that "[t]he issues presented by this case have no connection to qualified immunity." But as the Second Circuit correctly noted at the outset of its decision, this case raises "several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11," Pet. App. 2a, and the decision before this Court squarely addresses those important qualified-immunity issues. Second, respondent makes his lead argument not a defense of the decision below, but the contention (Br. 12-21) that there is no appellate jurisdiction to review the questions presented at all. But it is established that an order denying qualified immunity is "immediately appealable" when it turns on an "issue of law," *Behrens* v. *Pelletier*, 516 U.S. 299, 311 (1996), and sufficiency of the pleadings is a quintessential question of law. And third, respondent simply refuses to address the supervisory-liability question because he insists (Br. 12-13) that—for the same reasons he unsuccessfully advanced at the certiorari stage (Br. in Opp. 10, 28)—the Court should have denied certiorari on that question. But litigants do not get to decide what questions are properly presented—the Court does. And the court of appeals' application of a now undisputedly incorrect legal standard with respect to the supervisory liability of high-ranking officials under *Bivens* alone requires vacatur of the decision below.

In actually addressing the first question presented, respondent refuses to give effect to this Court's longstanding

precedent requiring a "firm application" of the Federal Rules of Civil Procedure in considering motions to dismiss on the ground of qualified immunity. *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). And respondent urges this Court not only essentially to disregard—or even undo—its most recent explication of the notice pleading standards imposed by the Federal Rules, but to conclude that petitioners—government officials who indisputably enjoy qualified immunity from suit—are entitled to *less* notice and protection from meritless claims at the pleading stage than routine civil defendants in an antitrust conspiracy case. See *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007). That effort is unavailing. A proper application of this Court's precedents before *Bell Atlantic* and the Federal Rules should have resulted in the dismissal of the claims against petitioner, but *Bell Atlantic* nevertheless underscores that the claims against petitioners must be dismissed because the bare and conclusory allegations at issue do not remotely cross "the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* at 1966.

To hold that petitioners are entitled to qualified immunity because the allegations against them are legally insufficient, the Court need only faithfully apply its existing precedents; it need not, as respondent repeatedly suggests (Br. 10, 23-25, 31, 34, 36, 39, 44), adopt a heightened pleading standard. Nevertheless, as Judge Cabranes stressed, and the amici former Attorneys General and Director of the FBI have echoed, a proper application of the Federal Rules is especially important when it comes to the types of claims at issue, given the strong "national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." Pet. App. 70a (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 541 (1985)

(Stevens, J., concurring in judgment)); see Barr Amicus Br. 6, 11-12, 15. The court of appeals' decision seriously threatens that vital "national interest" and should be reversed.

A. The District Court's Order Denying Petitioners' Motion To Dismiss On Qualified-Immunity Grounds Is Appealable

At the outset, respondent argues (Br. 13-21) that there is generally no appellate jurisdiction to review a district court decision denying a motion to dismiss on qualified-immunity grounds when the issue on appeal involves the sufficiency of the pleadings. That argument should be rejected.

It is settled that "an order denying qualified immunity, to the extent it turns on an 'issue of law,' * * * is immediately appealable." *Behrens*, 516 U.S. at 311 (quoting *Mitchell*, 472 U.S. at 530). The sufficiency of the pleadings to state a claim for relief is a paradigmatic question of law. Moreover, the fundamental reason for permitting interlocutory appeals in this context is that qualified immunity protects public officials from unwarranted litigation demands by providing "an *immunity from suit* rather than a mere defense to liability"—an immunity that is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526; see Pet. Br. 17. Claims that do not even satisfy threshold pleading requirements are among those that *most* warrant prompt dismissal.

Respondent appears to argue (*e.g.*, Br. 14-17) that the only qualified-immunity questions that are immediately appealable are those that relate narrowly to the abstract legal question whether an asserted right was clearly established at the relevant time, because only that question is completely separable from the underlying merits of a suit. But that position cannot be reconciled with this Court's decisions, which routinely assert interlocutory jurisdiction

in qualified-immunity cases to consider matters that overlap with the merits of a plaintiff's claims.

In *Hartman* v. *Moore*, 547 U.S. 250 (2006), for example, the Court determined that matters the plaintiff "must plead and prove in order to win" (there, the existence of probable cause) were "directly implicated by the defense of qualified immunity and properly before [the Court] on interlocutory appeal." *Id.* at 257 n.5. The Court later explained in *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007), that "the same reasoning applies to the recognition of the entire cause of action." *Id.* at 2597 n.4. Similarly, *Siegert* v. *Gilley*, 500 U.S. 226 (1991), observed that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of *whether the plaintiff has asserted a violation of a constitutional right at all.*" *Id.* at 232 (emphasis added); see *Scott* v. *Harris*, 127 S. Ct. 1769, 1773 n.2 (2007).

Respondent's contention (Br. 14-15) that *Mitchell* and *Behrens* require a narrower focus is wrong. Indeed, *Behrens* explained that *Mitchell* "held" that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is [immediately] appealable." 516 U.S. at 306 (quoting *Mitchell*, 472 U.S. at 530); accord *id.* at 311. While respondent asserts (Br. 15) that *Mitchell* never discussed "the sufficiency of the pleadings in that case," the *Mitchell* Court *upheld* qualified immunity after determining that the question properly before it was "whether *the facts alleged* * * * support a claim of violation of clearly established law." 472 U.S. at 528 n.9 (emphasis added). *Mitchell* further explained that "immunity is separate from the merits of the underlying action for purposes of the [collateral-order doctrine] even though a reviewing court *must consider the plaintiff's factual allegations* in resolv-

ing the immunity issue." *Id.* at 528-529 (emphasis added). And *Behrens* likewise explained that, because the "denial of a motion to dismiss is conclusive as to th[e] right" "to avoid the burdens of 'such *pretrial* matters as discovery,'" it is appealable to the extent that it turns on a question of law. 516 U.S. at 308 (quoting *Mitchell*, 472 U.S. at 526).

Respondent points to (Br. 14) a passage in *Mitchell* stating that "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not * * * determine whether the plaintiff's allegations actually state a claim." 472 U.S. at 528. When read in the context of the surrounding analysis, discussed above, that passage does not bear the weight respondent places on it. And, in any event, in subsequent cases like *Hartman*, *Wilkie*, and *Siegert*, this Court has asserted interlocutory jurisdiction to determine the legal sufficiency of a complaint's allegations.

Respondent's argument against jurisdiction is ultimately based on a misguided attempt to conflate a ruling concerning the sufficiency of the *evidence* at the summary-judgment stage (which is not appealable under *Johnson* v. *Jones*, 515 U.S. 304 (1995)) with a ruling concerning the sufficiency of the *pleadings* at the motion-to-dismiss stage (which is applicable in this context). The concern in *Johnson*, however, was not with "sufficiency" in the abstract, but with specific characteristics associated with a determination of the sufficiency of pre-trial evidence. See *id.* at 316-317; *Behrens*, 516 U.S. at 313 (explaining that *Johnson* addressed only factual, not legal, sufficiency). Here, by contrast, a motion to dismiss for failure to state a claim sufficient to overcome qualified immunity involves a purely legal issue that appellate courts are institutionally suited to decide, and the record on the question cannot improve as the lawsuit progresses, because the pleading question will continue to turn on the content of the complaint itself.

As the court of appeals recognized, this case presents a question about the "pleading standard to overcome a qualified immunity defense." Pet. App. 15a. In light of "the importance of resolving immunity questions at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam), this Court should decide that purely legal question on this interlocutory appeal.

B. Respondent Has Failed To Allege Facts Sufficient To Overcome Petitioners' Assertion Of Qualified Immunity

1. A plaintiff's conclusory allegations cannot negate the qualified immunity of high-ranking government officials

It is well settled that conclusory allegations are insufficient to defeat a motion to dismiss. Instead, as this Court recently emphasized, a complaint must contain "allegations plausibly suggesting" actionable conduct. *Bell Atl. Corp.*, 127 S. Ct. at 1966. To satisfy that standard, a complaint must contain sufficient "factual matter" to "raise a right to relief above the speculative level" and to "raise a reasonable expectation that discovery will reveal evidence of" illegal activity. *Id.* at 1965. Moreover, "factually neutral" allegations—*i.e.*, allegations that are consistent with lawful behavior—are inadequate to defeat a motion to dismiss. *Id.* at 1966 n.5. A proper application of that rule is especially critical in cases involving high-ranking government officials' qualified immunity. Otherwise, conclusory allegations could negate the immunity and produce all of the consequences that qualified immunity is supposed to prevent—consequences that could be particularly grave in cases involving national security. See Pet. Br. 16-21.

a. Respondent contends (Br. 37) that qualified immunity is wholly irrelevant here because the application of pleading standards should not vary depending on the identity of the defendant or the nature of the claims. It is impos-

sible, however, to determine whether particular allegations are factually suggestive of illegal conduct without considering the legal and factual context of a suit. Thus, the adequacy of the allegations in a complaint must be evaluated in the context of the type of claim it raises.

Bell Atlantic therefore recognized that allegations going to the existence of an antitrust conspiracy must be considered in the context of substantive antitrust law. See 127 S. Ct. at 1964. Indeed, this Court held that allegations of an antitrust conspiracy that relied entirely on the existence of parallel business conduct were insufficient to state a claim because "common economic experience" showed that there could be legitimate reasons for parallel conduct. *Id.* at 1971.

Respondent suggests (Br. 37-38) that *Bell Atlantic*'s discussion of the plausibility threshold was limited to the context of an "antitrust conspiracy claim." But as the Court's blanket disavowal of the "no set of facts" rule underscores, the Court's discussion of pleading standards was not confined to antitrust-conspiracy claims. See 127 S. Ct. at 1968-1970. At the same time, however, *Bell Atlantic* teaches that a court must consider substantive law and context when determining whether a particular complaint meets Rule 8(a)(2) of the Federal Rules. See *Phillips* v. *County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (recognizing that "[f]air notice under Rule 8(a)(2) depends on the type of case"); see also Pet. Br. 27.

Just as substantive antitrust law was relevant to evaluating the allegations in *Bell Atlantic*, so too is substantive qualified-immunity doctrine, including the standard for supervisory liability, relevant to evaluating complaints against government officials. As demonstrated in petitioners' opening brief (Pet. Br. 17-19), the Court has set forth a number of substantive rules relating to qualified immunity that are relevant here, including that qualified immunity protects

government officials not simply from the burdens of standing trial but also from "the burdens of 'such pretrial matters as discovery.'" *Behrens*, 516 U.S. at 308 (quoting *Mitchell*, 472 U.S. at 526). This Court has thus insisted on a "firm application" of the Federal Rules of Civil Procedure in considering motions to dismiss on the ground of qualified immunity. *Butz*, 438 U.S. at 508.

Such a "firm application" of the Federal Rules means that a Court "must exercise its discretion in a way that protects the substance of the qualified immunity defense * * * so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El* v. *Britton*, 523 U.S. 574, 597-598 (1998). Among the discretionary measures a court must employ is "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)).

Respondent argues (Br. 35) that this Court's admonition that trial courts should require plaintiffs to "put forward specific, nonconclusory factual allegations that establish * * * cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment" (*Crawford-El*, 523 U.S. at 598 (quotation marks omitted)) was limited to the particular remedy of granting a motion for a more definite statement under Rule 12(e). But the Federal Rules also provide another obvious remedy for a deficient complaint: dismissal under Rule 12(b)(6) based on failure to meet the pleading standards of Rule 8(a)(2) in light of a qualified-immunity defense asserted in a motion to dismiss. See *Jones* v. *Bock*, 549 U.S. 199, 215-216 (2007) (recognizing that a defense can be a basis for dismissal for failure to state a claim). To the extent that respondent believed he could de-

feat the motion to dismiss by providing more detailed allegations, he could have sought leave to amend his complaint under Rule 15(a)(2), but he has not done so, and the allegations as to petitioners that are in his complaint are legally deficient.

Respondent's claims arise from an investigation launched immediately after the September 11 attacks that was unprecedented in size. "Within 3 days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation," and "[b]y September 18, 2001, the FBI had received more than 96,000 leads from the public." Pet. App. 76a n.4. In ordinary times, the Attorney General and Director of the FBI are not personally involved in the operational decisions made by officers much lower down on the bureaucratic chain of command; the size of the September 11 investigation made such detailed involvement all the more infeasible. Especially given that context, it is not enough simply to allege conclusorily that the Attorney General or the FBI Director "knew of" or "condoned" (*id.* at 172a (Compl. ¶ 96)) particular acts by their subordinates, because such a claim requires additional subsidiary facts to move the complaint from being merely possible to being plausible. *Bell Atl. Corp.*, 127 S. Ct. at 1966. See Barr Amicus Br. 15-16 (explaining that this scenario is not plausible on the facts alleged).

Similarly, any claim that an official created a discriminatory policy must be based on factual allegations that suggest the existence of a policy of the type that such officials would be expected to issue. Thus, it is not sufficient simply to allege that a high-level officer was "instrumental" or a "principal architect" of a policy like the one respondent alleges. Instead, there must be an actual factual basis in the complaint for concluding that such a policy exists and was

handed down by such a high-level officer—here the Attorney General or Director of the FBI himself.

Respondent relies (Br. 3) on *Gomez* v. *Toledo*, 446 U.S. 635 (1980), for the proposition that a plaintiff need not anticipate the qualified-immunity defense in his complaint. *Gomez*, however, held only that a plaintiff need not allege that, in addition to violating the law, a defendant also acted in bad faith. *Id.* at 640. Now that this Court has replaced the bad-faith standard with an objective one for qualified immunity, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-818 (1982), that holding of *Gomez* is obsolete. Because the qualified-immunity and merits questions now turn on the same set of historical facts, the question under Rule 8(a)(2) is simply whether the plaintiff pleaded sufficient facts to make his claim plausible the context of the motion to dismiss asserting qualified immunity. Respondent has not done so.

b. Respondent does not dispute that, if his allegations are sufficient to subject high-ranking officials like the Attorney General and the Director of the FBI to the demands of litigation, then, as Judge Cabranes recognized, virtually any complaint challenging the alleged actions of lower-level officers could draw in such officials simply by "following the blueprint laid out by this lawsuit." Pet. App. 70a (concurring opinion); see Barr Amicus Br. 6. Indeed, respondent acknowledges (Br. 41) that his position "could result in some complaints with 'conclusory' allegations advancing to discovery" (citation omitted). But as this Court reinforced in *Bell Atlantic*, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions." 127 S. Ct. at 1964-1965. Instead, a plaintiff must provide "enough *fact* to raise a reasonable expectation that discovery will reveal evidence of" illegal conduct. *Id.* at 1965 (emphasis added).

If adopted, respondent's position would effectively return the Federal Rules to the unduly lax pleading regime adopted by many courts on the basis of *Conley* v. *Gibson*, 355 U.S. 41 (1957).[1] As explained in petitioners' opening brief (at 21-22), before *Bell Atlantic*, the courts of appeals had difficulty harmonizing the substantive rules of qualified immunity and the "accepted rule" that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46; see, *e.g.*, *Thomas* v. *Independence Twp.*, 463 F.3d 285, 299 (3d Cir. 2006). In *Bell Atlantic*, this Court declared that *Conley*'s "no set of facts" formulation—on which the district court relied in this case, Pet. App. 136a-137a, 146a—was "best forgotten as an incomplete, negative gloss on an accepted pleading standard." 127 S. Ct. at 1969.

Respondent contends (Br. 23-24) that petitioners' position is indistinguishable from the heightened pleading standards invalidated in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002). That is incorrect. Petitioners do not ask the Court to adopt any heightened pleading standard. Rather, their position is that the lower courts failed to follow this Court's decisions in this area and give a "firm application" of the Federal Rules. Re-

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[1] Respondent's law-professor amici urge just such a retreat: "[I]mplausibility might be established if the plaintiff were to allege a state of affairs that was *so beyond the common understanding as to be virtually, if not literally, incredible.*" Profs. of Civ. Pro. Br. 14 (emphasis added). That "incredibility" standard is indistinguishable from the standard that this Court squarely rejected in *Bell Atlantic* (127 S. Ct. at 1969) of allowing a complaint to survive "unless it appears beyond doubt that the plaintiff can prove no set of fact in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

spondent's reliance (*e.g.*, Br. 32-33) on Rule 9(b), which makes clear that its heightened pleading standard does not apply to allegations of intent, is misplaced for the same reason. Rather than seeking a heightened pleading standard for *any* of respondent's allegations, petitioners argue that the normal Rule 8(a)(2) pleading standard must be considered—as *Bell Atlantic* reinforces—contextually with respect to matters such as the plausibility of an allegation.[2]

2. Respondent's allegations against petitioners are too conclusory to overcome a motion to dismiss

As explained in petitioners' opening brief (Br. 30-38), respondent's conclusory allegations fall significantly short of stating a plausible claim for relief. See also Barr Amicus Br. 11-18. Although respondent lists (Br. 47-48) a number of allegations that supposedly suggest illegal conduct on the part of petitioners, whether taken singly or together, they

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[2] Respondent's heavy reliance (*e.g.*, Br. 24, 41) on *Swierkiewicz* is especially misplaced. *Swierkiewicz* was a suit against a private company under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, not a *Bivens* suit against high-level government officials. See Pet. Br. 38. In any event, as this Court noted, the plaintiff "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Swierkiewicz*, 534 U.S. at 514. In the context of a suit against the company for actions taken by a plaintiff's superior, the allegations were adequately specific to make out a plausible claim of employment discrimination. Respondent's reliance (Br. 40-41) on *Erickson* v. *Pardus*, 127 S. Ct. 2197 (2007) (per curiam), is likewise misplaced because the complaint there included specific details, see Pet. Br. 39 n.7, and the fact in dispute—whether the plaintiff could suffer harm when prison officials discontinued his prescribed treatment program for hepatitis C, *Erickson*, 127 S. Ct. at 2200—had nothing to do with establishing the personal involvement or conduct of the defendants.

are not sufficient to cross "the line between the conclusory and the factual" (*Bell Atl. Corp.*, 127 S. Ct. at 1966 n.5) under this Court's precedents. They do not, in other words, "possess enough heft" to meet Rule 8(a)(2)'s requirement that a pleader "show[]"—as opposed merely to assert—that he "is entitled to relief." 127 S. Ct. at 1966.

a. Respondent advances (Br. 24, 45-46) two theories for liability. The first is that, as part of the investigations into the September 11 attacks, the Attorney General and the FBI Director designed a policy of classifying suspects as "of high interest" to the investigation and holding them in more restrictive conditions of confinement solely on account of their race, religion, or national origin. See Resp. Br. 49. As the district court here recognized, "the assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim." Pet. App. 116a (citing *Nuclear Transp. & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1355 (6th Cir. 1989)). And respondent points to no factual allegations that support the existence of such a *discriminatory* policy. Instead, respondent relies (Br. 48), for instance, on the allegation that

> [t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.

Pet. App. 168a (Compl. ¶ 69). Respondent also highlights (Br. 48) his equally conclusory allegation that petitioners

> willfully and maliciously designed a policy whereby individuals such as [respondent] were arbitrarily designated to be confined in the ADMAX SHU without providing any individual determination as to whether such designation was appropriate or should continue.

Pet. App. 173a (Compl. ¶ 97). Neither of those allegations suggests in any way that petitioners were involved in invidious discrimination. The allegations of petitioners' involvement are conclusory, and in any event there is nothing inherently *discriminatory* about a general policy of holding suspects until cleared of any connection with the September 11 attacks, or with the alleged failure to provide an individual classification determination. See Pet. Br. 34-35.

Furthermore, respondent's other factual allegations contradict his claim that there was ever any national policy of classifying suspects as "of high interest" to the September 11 investigation solely because of their race, religion, or national origin. According to respondent, all of the alleged conduct was conducted by officials lower down on the chain of responsibility. He alleges that two lower-level officials "were responsible for making the initial determination as to whether detainees arrested within the New York area in the weeks and months after September 11 were classified as 'of high interest' to the government's investigation," and that those lower-level officials acted "*without specific criteria or a uniform classification system.*" Pet. App. 164a (Compl. ¶¶ 48, 50) (emphasis added). Furthermore, not even respondent claims that all people of Muslim or Arab origin who were detained as part of the September 11 investigation were classified as being "of high interest," or that all such classifications were the result of unlawful discrimination. *Ibid.* (Compl. ¶¶ 47, 48) (alleging only that "[m]any" of the "thousands of Arab Muslim men" that were arrested as part of the September 11 investigation were classified "as high interest"); *ibid.* (Compl. ¶ 49) (alleging only that "[i]n many cases" was the classification made because of the race, religion, and national origin of the detainees).

If, as respondent claims (Br. 49), the Attorney General and FBI Director had personally mandated a "discrimina-

tory policy of classifying Arab and Muslim detainees as 'high interest' solely because of their race, religion, and national origin," one would have expected more than a fraction[3] of Arabs and Muslims held as part of the September 11 investigation to have been classified as "of high interest."[4] One would also have expected it to take much less than two months after his November 2001 arrest for respondent himself to be placed under more restrictive conditions. See Pet. App. 169a (Compl. ¶¶ 80-81). Thus, when the complaint is read as a whole, its allegations against petitioners are even less plausible than when taken in isolation.

Respondent also relies (Br. 47-48) on a number of broad and conclusory allegations related to general supervisory responsibility that simply do not provide "enough fact to

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[3] According to the Office of Inspector General Report, of the 762 individuals held on immigration charges for suspected links to the September 11 attacks, only 184 were deemed to be "of high interest" to the investigation and held under special conditions of confinement. See Pet. Br. 33 n.4.

[4] Respondent also urges (Br. 53) that alleged discriminatory animus with regard to the decision to classify other suspects as merely "of interest" to the investigation would support his claims against petitioners. To begin with, even if that claimed discrimination took place, the complaint would still be fatally flawed because it fails to provide sufficient factual matter to make plausible the personal involvement of petitioners in any discriminatory decision. But in any event, respondent's allegations are focused not on any decision to classify other suspects as "of interest" but of the decision to classify him as "of high interest" (and thus house him under more secure conditions of confinement). See Pet. App. 201a (Compl. ¶ 232) (raising cause of action based on "policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' sincere religious beliefs"); *id.* at 202a (Compl. ¶ 235) (same regarding race discrimination). The court of appeals similarly focused on the allegation that respondent was classified as "of high interest" to the investigation "solely because of his race, ethnicity, and religion." *Id.* at 59a.

raise a reasonable expectation that discovery will reveal evidence of" a discriminatory policy. *Bell Atl. Corp.*, 127 S. Ct. at 1965. Conclusory allegations that the head of an agency was "instrumental" or a "principal architect" of everything in a complaint, see Pet. App. 157a (Compl. ¶¶ 10, 11) would be tantamount to extending *respondeat superior* liability to *Bivens* claims. Similarly, the entirely conclusory allegation that petitioners "adopt[ed] * * * a policy and practice" of illegally discriminating against respondent or "agreed to deprive" him of equal protection and privileges and immunities, *id.* at 201a, 202a, 208a (Compl. ¶¶ 232, 235, 250), cannot plausibly suggest illegal conduct absent some factual basis for those claims. To the extent respondent alleges (Br. 47) that the September 11 investigation generally focused on suspects who shared the common characteristics of the September 11 hijackers, that allegation does not materially advance the specific claim that the Attorney General and FBI director directed lower-level officials to classify suspects as "of high interest" to the investigation and confine them in more restrictive conditions solely because of their race, religion, and national origin.

b. Respondent's second theory of liability—that petitioners knew of and acquiesced in "their subordinates' use of discriminatory criteria to make classification decisions among detainees" (Resp. Br. 45-46)—fares no better. The Attorney General and the FBI Director generally do not involve themselves in the granular operational decisions of their subordinates. And respondent's suggestion that petitioners engaged in this sort of micro-management during one of the largest criminal and national-security investigations in United States history is particularly implausible. See Barr Amicus Br. 15-16. Especially given the context in which these claims have been raised, respondent was required to come forward with "specific, nonconclusory factual

allegations" to establish petitioner's knowledge of and acquiescence in alleged discrimination by lower level officials. *Crawford-El*, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)).

Not only did respondent fall well short of that obligation, the complaint is wholly devoid of any factual support for respondent's claim. To demonstrate knowing acquiescence in unconstitutional conduct by petititioners' subordinates, respondent relies heavily on his conclusory allegation that petitioners "knew of, condoned, and willfully and maliciously agreed to subject" respondent to the more restrictive detention conditions "solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Pet. App. 172a-173a (Compl. ¶ 96). But that allegation does nothing to suggest why, contrary to usual practice, petitioners would have actual knowledge of the classification decisions being made by lower level officials.[5] Moreover, the

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[5] Respondent states (Br. 43) that "in the lower courts, defense counsel have suggested that petitioner Ashcroft authored a memorandum to subordinates * * * outlining how the classification system * * * was to be carried out." As explained in our reply brief at the certiorari stage (at 4 n.2), the apparent document cannot bear the speculative weight that respondent places upon it. More important, whatever has been stated in later proceedings in the case, *the complaint* fails to allege any direct communication between petitioners and lower-level officials responsible for classification decisions.

For the same reasons, the sufficiency of the allegations in respondent's *complaint* is not affected by extra-record materials that amici claim they have discovered. See Turkmen Amicus Br. 20. A complaint must cross the line between the possible and the plausible before discovery is appropriate, and neither respondent nor his amici can overcome the deficiencies in the complaint at issue by pointing to material described in an amicus brief. Although other amici contend that an exception should be made when facts are in the defendants' possession (Amer. Ass'n for Justice Amicus Br. 19-25; Nat'l Civ. Rights Orgs. Amicus Br. 5, 30; Japanese American Citizens League Amicus Br. 37),

vast majority of Arab and Muslim men who were arrested on immigration or criminal charges as part of the September 11 investigation were *not* classified as being "of high interest." See note 3, *supra*. Not only does that fact suggest a lack of discriminatory animus at any level of government, it makes respondent's claim that petitioners were aware of supposed discrimination even less plausible: Even if petitioners knew the demographic particulars of those being arrested and detained, there would have been no reason for them to draw the conclusion that lower-level subordinates were using discriminatory criteria to classify suspects. Thus, without further "factual matter," respondent's complaint fails to "raise a right to relief above the speculative level." *Bell Atl. Corp.*, 127 S. Ct. at 1965.

Because the complaint provides insufficient support to the claim that petitioners had personal involvement in any discriminatory decision, respondent is left with only his allegations that petitioners exercised ultimate supervisory responsibility over the lower-level officials who were responsi-

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that would also have been true about the allegedly illegal agreement between the defendants in *Bell Atlantic*.

Moreover, the Turkmen amici concede that, even with the information in their proposed lodging, "[m]ore investigation is required to determine whether petitioners directed that Muslim and Arab men be treated as 'of interest' to the terrorism investigation." Amicus Br. 4. None of the information they point to (*id.* at 10-14) shows that petitioners were "aware" of discriminatory classification decisions. The fact that daily reports submitted to the Attorney General listed specific connections to the September 11 hijackers for some detainees but not others (*id.* at 13-14) would not have signaled that the others (who were still being investigated) were of "interest" to the FBI only because of their race, religion, or nationality. Similarly, even if proven, their allegation (*id.* at 15-16) that the Attorney General caused certain suspects (not including respondent) to be placed on a list of those whose potential connections to the September 11 investigation were still being investigated, would not show *discriminatory* intent.

ble for classification and confinement decisions, as part of their responsibility for investigating and prosecuting violations of federal criminal law. See Pet. App. 157a, 164a (Compl. ¶¶ 10, 11, 47). But, as explained below (see Pt. C, *infra*), and as petitioners do not dispute, mere supervisory responsibility and constructive knowledge of wrongdoing by subordinates cannot be an adequate basis for holding petitioners personally liable under *Bivens*.

c. Respondent's speculation (Br. 38-39) that affirming the court of appeals will not burden petitioners because of the instruction to the district court to limit discovery is incorrect and beside the point. As this Court has stressed, "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" *Bell Atl. Corp.*, 127 S. Ct. at 1967. That principle has all the more force in the qualified-immunity context, as discussed above, and in cases against high-ranking government officials who could be subjected to multiple discovery requests if such generalized and conclusory allegations are sufficient to obtain discovery. See Pet. App. 67a-70a & n.1.[6]

Respondent also argues (Br. 43, 55) that his complaint is sufficient because petitioners are able to file an answer that generally denies the general averments of the complaint. But the ability to give a general denial of general allegations

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[6] Respondent's suggestion (Br. 11) that it will only be the "rare" case in which "officials like petitioners may properly be subject to discovery" is belied by other courts that have already invoked the decision below in allowing implausible claims to proceed. See, *e.g.*, *Twitty* v. *Ashcroft*, No. 3:04-CV-410 (RNC), 2008 WL 346124, at *1 (D. Conn. Feb. 4, 2008) (refusing, in light of decision below, to dismiss prisoner's claim that Attorney General Ashcroft and other federal officials were personally involved in the decision to transfer him from a federal penitentiary in Illinois to a Connecticut state prison in retaliation for filing lawsuits and grievances).

in a complaint is not the determinant of the sufficiency of the pleadings; rather, as this Court has made clear, the allegations must also be sufficiently factual and plausible to "raise a reasonable expectation that discovery will reveal evidence of" illegal activity. *Bell Atl. Corp.*, 127 S. Ct. at 1965. Respondent's allegations do not pass that threshold.[7]

C. Respondent Does Not Dispute That Supervisory Liability Under *Bivens* May Not Be Premised On Constructive Notice

The second question on which this Court granted review is whether a "high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Pet. (i). As explained in our opening brief (at 44-47), that question goes directly to the proper scope of the cause of action inferred in *Bivens*. Indeed, this Court has refused to extend the *Bivens* remedy to suits against anyone other than the individual officers responsible for the alleged constitutional violation. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471 (1994).

Respondent simply refuses (at 12-13) to address the merits of that question. As a result, respondent does not dispute that the court of appeals articulated an incorrect

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[7] Respondent also suggests (Br. 39) that the government's settlement with Ehab Elmaghraby is itself proof that his claims are not "insubstantial." But that was a settlement of Elmaghraby's claims *against the United States* under the Federal Tort Claims Act that he had been physically abused by prison guards and negligently denied adequate medical treatment. See 04-CV-1809 Docket entry No. 404 (E.D.N.Y. Mar. 15, 2006) (Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677). Because Elmaghraby recovered nothing on his *Bivens* claims, his settlement does not enhance the viability of respondent's claims against the former Attorney General and current FBI Director.

legal standard and that petitioners could not be held liable unless they had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being "of high interest" and they were also deliberately indifferent to that discrimination. See Pet. Br. 42-52. The court of appeals' undisputed application of an incorrect legal standard suffices by itself to require vacatur of the decision below.

Instead of briefing the second question presented on the merits, respondent simply renews (Br. 12-13) his petition-stage argument that certiorari was not warranted: that the question is not properly presented here because respondent has not alleged a constructive-knowledge theory of liability and the court of appeals, notwithstanding its articulation of such a theory, did not actually rely on it. See Br. in Opp. 10, 28. That contention is refuted by the record.

In arguing that petitioners had sufficient personal involvement in the alleged constitutional violations, respondent specifically contended in the court of appeals that such involvement "may be established" where "the official was grossly negligent in supervising subordinates who committed the wrongful acts." Resp. C.A. Br. 30 (quoting *Johnson* v. *Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir. 2001)); see *id.* at 31 n.10 (arguing that "sufficient personal involvement may be stated by means of allegations that a defendant created a policy under which unconstitutional practices occurred, allowed the continuation of allegedly unlawful policies within the defendant's supervisory responsibility, or exhibited gross negligence or deliberate indifference to actual or constructive notice of unconstitutional practices" (internal citations omitted)). The court of appeals therefore recognized that respondent's claims rest in part on "generalized allegations of supervisory involvement." Pet. App. 25a.

More important, the court of appeals expressly adopted—as the controlling legal standard—a constructive-notice theory of liability. Pet. App. 14a. And at the culmination of its discussion of respondent's discrimination claims, the court specifically invoked its permissive standards for supervisory liability in concluding that petitioners may be held personally liable "for the actions of their subordinates under the standards of supervisory liability outlined above" in its opinion. *Id.* at 62a. The court thereby relied on a legal standard that respondent does not defend.

Respondent claims (Br. 13) that petitioners "conced[ed] the validity of the very theory they now challenge" when their court of appeals brief quoted the court of appeals' well-established standard for supervisory liability. The court of appeals noted, however, that petitioners "argue[d] that [respondent] failed to allege their personal involvement in any discrimination" and therefore failed to state a claim on which relief could be granted. Pet. App. 62a. The court went on to reject that argument, holding that—notwithstanding respondent's own acknowledgment that petitioners were not involved in any individual classification decisions—petitioners could have "personal responsibility for the actions of their subordinates" under the Second Circuit's broad standards of supervisory liability. *Ibid.* As the government's petition-stage filings explained, this Court may review an issue that was either pressed or passed upon in the court of appeals. *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992); Pet. Reply 10-11. Respondent is merely rehashing arguments that were briefed at the petition stage and that this Court presumably rejected in deciding to grant review of the second question presented.

Respondent also claims (Br. 12-13) that this Court lacks "jurisdiction" over the second question. But that argument is similarly unavailing: there is a live dispute between the

parties in this case, this Court granted review of the second question, and the supervisory liability standard is actually antecedent to the question whether respondent adequately pleaded claims against petitioners. A *respondent's* failure to join issue on a question as to which the Court granted certiorari provides no reason for the Court to refrain from deciding it on the merits, particularly when, as here, the question is important and recurring. See Pet. 25-33.

More fundamentally, respondent has ignored the centrality of the supervisory-liability standard for the qualified-immunity determination. Officials risk liability only when *they* violate clearly established rights, and this Court has long protected government supervisors from liability for the conduct of subordinates. Pet. Br. 44. Even more than during the nineteenth century, see *Parish* v. *United States*, 100 U.S. 500, 504 (1880), executing the law requires multiple officers—in this case, many subordinate components, many with their own headquarters and field offices, each exercising a portion of the broad responsibility vested in a department head. The court of appeals' standard disregards the complexities of levels of responsibility in government, increases the personal exposure that our most senior executive officials undertake when they accept their responsibilities of office, and extends the inferred *Bivens* remedy well beyond its intended purposes as well as beyond the express cause of action in 42 U.S.C. 1983. See Pet. Br. 44-50.

The court of appeals' reliance on an undisputedly erroneous legal standard in allowing the *Bivens* claims against petitioners to proceed is alone fatal to its judgment.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be

reversed and the case should be remanded with instructions to dismiss the remaining claims against petitioners.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

NOVEMBER 2008

REPLY BRIEF

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No. 07-1015

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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF DENNIS HASTY AS RESPONDENT SUPPORTING PETITIONERS

MICHAEL L. MARTINEZ *
DAVID E. BELL
MATTHEW F. SCARLATO
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

* Counsel of Record

Counsel for Respondent Dennis Hasty

November 24, 2008

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ARGUMENT

Respondent Iqbal's opposition brief fundamentally mischaracterizes petitioners' arguments. Iqbal claims that the "heart of petitioners' argument is that the pleading standard imposed by Fed. R. Civ. P. 8 and 9 is *different* for cases in which the affirmative defense of qualified immunity is invoked by 'high-ranking' defendants who acted during a threat to national security." Brief For Respondent Javaid Iqbal ("Iqbal Br.") at 9 (emphasis added). He then attacks this

straw man, arguing myriad reasons why no "heightened" pleading standard applies in this case.[1]

These arguments are misplaced. Neither petitioners nor Hasty have advocated for dismissal of Iqbal's claims on the grounds that a heightened pleading standard applies to Iqbal's Complaint. But Iqbal has failed to satisfy *any* pleading standard. Indeed, his Complaint contains no facts – only conclusory allegations as to petitioners and Hasty. As petitioners' and Hasty's opening briefs demonstrate, the Second Circuit's finding that these allegations were adequate conflicts with this Court's qualified immunity jurisprudence, as well as its recent guidance in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), concerning the minimum pleading required by Rule 8 of the Federal Rules of Civil Procedure ("Rule" or "Rules").

Moreover, respondent's arguments run contrary to this Court's teachings on qualified immunity. This Court has made clear that federal officials' entitlement to qualified immunity requires that "'insubstantial claims' against government officials be resolved *prior* to discovery," *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (emphasis added), but application of the standard invoked by the Second Circuit renders this pronouncement meaningless. As Judge Cabranes noted in his concurring opinion, allowing cases to move forward against supervisory officials

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[1] Iqbal also makes several arguments addressing the threshold question of whether this Court has jurisdiction over this appeal. These arguments are without merit, and jurisdiction is proper over all of the issues in this appeal. Because petitioners Ashcroft and Mueller amply address the reasons that Iqbal's arguments should be rejected, Hasty does not repeat them here, and focuses on Iqbal's remaining arguments.

based on conclusory allegations regarding their personal involvement would allow any potential plaintiff to "follow[ ] the blueprint laid out by this lawsuit," and bring similarly baseless *Bivens* claims. *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring).

This is not to say that cases involving qualified immunity and supervisory liability of federal officials require a "heightened" pleading standard, or even a "different" pleading standard. Rather, as this Court's recent guidance in *Twombly* makes clear, Iqbal – like any plaintiff – must set forth some level of "factual matter" to render his claim for relief plausible. *Twombly*, 127 S. Ct. at 1965. He has failed to do so here. Instead, Iqbal seeks to impute liability to petitioners and Hasty not for their own acts, but for their roles as supervisors of those who purportedly committed such acts. Yet in making his allegations against the supervisory officials in this case, Iqbal does not articulate any facts about their conduct that would support such liability. Thus, Iqbal's claim fails to satisfy Rule 8 and should be dismissed.

I. Petitioners Are *Not* Advocating a "Heightened" Pleading Standard.

Repeating his now familiar mantra, Iqbal argues that petitioners are inappropriately advocating a "novel" and "heightened" pleading standard for cases such as this that involve (1) defendants that are high-ranking officials who (2) invoke qualified immunity, and (3) the case implicates national security issues. Iqbal Br. at 22-45. But petitioners and Hasty do not now and have *never* sought to impose a pleading standard greater than that required under Rule 8.

This Court's decision in *Twombly* confirmed that in order to satisfy Rule 8(a)(2)'s requirement, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," the allegations must contain sufficient facts to support the claim and mere legal conclusions do not suffice. While acknowledging that "detailed factual allegations" are not required, *Twombly* emphasizes that a complaint must contain some minimum level of "factual matter" that "raise a right to relief above the speculative level." *Id.* at 1965. That is the precise point of petitioners' and Hasty's argument, which they made even prior to *Twombly,* because the federal courts have traditionally required some allegation of relevant facts. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938) (rejecting allegations concerning whether interstate commerce was at issue in the case because a motion to dismiss "admits as facts allegations describing the manner in which the business is carried on, but not legal conclusions from those facts. The allegations that interstate or foreign commerce is not involved are conclusions of law."); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ("While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice.").

Iqbal misses the point by arguing that *Twombly* "does not suggest, however, that the facts necessary to state a claim are to be adjusted based on the status of a defendant, the fact that a plaintiff is bringing a constitutional tort claim, or to take account of an affirmative defense." Iqbal Br. at 37. That is not the thrust of petitioners' or Hasty's arguments. Rather, their arguments focus on the failures in Iqbal's Complaint to satisfy the Rule 8 standard.

II. This Court's Qualified Immunity Jurisprudence Complements The *Twombly* Decision.

That no heightened pleading standard applies in *Bivens* cases does not mean that this Court's qualified immunity jurisprudence is irrelevant to the outcome here. To the contrary, it is an important overlay to the analysis.

Since the inception of *Bivens* lawsuits, this Court has carefully handled qualified immunity cases to balance the competing policy considerations that underlie the application of immunity. At its core, the immunity seeks to protect government officials' "willingness to execute [their] office[s] with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Thus, this Court has repeatedly recognized that qualified immunity should be resolved at the "earliest possible stage in litigation" to protect officials from the burdens of litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curium); *see also Anderson*, 483 U.S. at 640 n.2 ("'insubstantial claims' against government officials be resolved *prior* to discovery.").

These key principles necessarily inform the Court's analysis in evaluating whether the pleading standard is met. As the Tenth Circuit recently observed, the Rule 8 standard as described in *Twombly* may have "greater bite" in cases involving qualified immunity, due both to their complexity and to "appropriately reflect[ ] the special interest in resolving the affirmative defense of qualified immunity 'at the earliest possible stage of a litigation.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008) (quoting

Anderson, 483 U.S. at 646 n.6). This does not equate to a heightened pleading standard, but simply reflects the interests to be weighed in evaluating when a claim is sufficiently supported by facts to cross the line from possible to plausible.

Indeed, in *Twombly* itself, this Court considered the "practical significance" of pleading standards as applied to antitrust cases, finding that its holding was supported by the need to "check[ ] discovery abuse" in antitrust cases because "antitrust discovery can be expensive." 127 S. Ct. at 1966-67. Similarly, this Court's review of pleading standards in this case implicates fundamental principles of qualified immunity in the form of unduly burdening supervisory officials with baseless lawsuits via an inappropriately permissive pleading standard. Thus, it is entirely appropriate for this Court to consider these interests in evaluating Iqbal's claim.

III. Iqbal's Allegations Linking Petitioners and Hasty to the Violations Alleged Do Not Meet Rule 8's Requirements.

Iqbal's complaint fails to meet the Rule 8 standard as to the supervisory defendants such as petitioners and Hasty. Iqbal's allegations of these Defendants' personal involvement in the violations alleged consist of nothing more than a parroting of the applicable standard for supervisory liability. *See* Brief of Dennis Hasty as Respondent Supporting Petitioners at 18. And *Twombly* confirms that a complaint must contain more than "a formulaic recitation of the elements of a cause of action . . . ." 127 S. Ct. at 13.

Thus, contrary to Iqbal's assertion that petitioners and Hasty are advocating a "defendant-specific" pleading standard based on the high-level "status" of a

particular defendant, Iqbal Br. at 30-31, 44, they are merely pointing out that Iqbal's claims against them are premised entirely on conclusory legal assertions and not any specific factual allegations as to them. Iqbal does not – and plausibly could not – allege that Hasty or petitioners *directly* caused the harms he alleges; his only theory of liability against Hasty and the petitioners is that they are responsible for the acts of their subordinates. And those allegations are generalized at best. Since, as Iqbal admits, there is no *respondeat superior* liability applicable in *Bivens* cases, *see* Iqbal Br. at 46, Iqbal is left with arguing personal liability without factual allegations as to each defendant to rely upon. The harmonized principles of qualified immunity and Rule 8 dictate that such a claim fails from the outset.

Iqbal's excessive force claim illustrates this point. Iqbal does not allege Hasty ever personally used "excessive force" or that he was made aware of any such act and ignored it. If he had made such allegations *of fact*, that might well satisfy Rule 8. He does not. Instead, Iqbal alleges generally that Hasty was complicit in creating undefined "policies and customs" at the Metropolitan Detention Center ("MDC") or failed to take remedial action. *See* First Amended Complaint ¶ 124; App. 177a. That is the extent of the "factual" allegations as to Hasty. The same is true for *all* of Iqbal's claims against Hasty, which are framed in a fashion similar to Iqbal's allegations against petitioners.

Indeed, Iqbal's claims as to Hasty fail to go beyond "conclusory" allegations and do not constitute sufficient "factual matter" to plausibly support a right to relief. Like the plaintiffs in *Twombly*, the absence of *any* fact suggesting a right to relief against petition-

ers and Hasty demonstrates that his complaint fails "*in toto* to render plaintiffs' entitlement to relief plausible." 127 S. Ct. at 1973 n.14.

Iqbal attempts to avoid these facial deficiencies by emphasizing the "fair notice" requirement under Rule 8, arguing that his allegations will "enable the defendant to answer and prepare for trial." Iqbal Br. at 40 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1215 (3d ed. 2004)). Yet Iqbal's contention simply takes the "fair" out of the level of notice required. Because Iqbal's allegations against the supervisory defendants consist of a restatement of the applicable legal standard for supervisory liability – which itself has several inconsistent prongs – there can be no indication to defendants how they are linked to the alleged violations that occurred other than knowing the legal standard applicable in this case.

Indeed, like the antitrust context, cases "against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants," which gives *Twombly* a greater "bite" in these cases. *Robbins*, 519 F.3d at 1249. That is precisely the case here, where Iqbal asserts a total of 21 claims against 35 named defendants. And "fair notice" is not given simply by restating the legal test for supervisory liability, just like restating the elements of a Sherman Act conspiracy claim did not support "fair notice" of such a claim in *Twombly*. *See* 127 S. Ct. at 1965. The supervisory defendants are left to guess the bases of Iqbal's claims against them – a result clearly prohibited by Rule 8. While "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer

evidence to support the claims," *Scheuer*, 416 U.S. at 236, Iqbal's mimicking of the applicable legal standard consists of precisely the type of "fishing expedition" that this Court recognizes has been "uniformly . . . met with judicial condemnation." *Jones v. SEC*, 298 U.S. 1, 26 (1936) (citations omitted).

That the "special interests" of qualified immunity are at issue here only reinforces that truth to its highest level. *See Robbins*, 519 F.3d at 1249. Iqbal simply misses the mark in claiming that "petitioners received all of the substantial protections contemplated by the qualified immunity defense" based on the procedural history of this case, including the lower courts implementing a plan to "cabin" discovery to limit the burdens these defendants would face. Iqbal Br. at 27. Not only does this argument overlook the fact that petitioners' and Hasty's qualified immunity defense was *erroneously* denied, but encouraging even the filing of frivolous lawsuits by adopting an overly permissive pleading standard still imposes inappropriate burdens on defendants. As Judge Cabranes recognized in his concurring opinion below, the "blueprint" laid out by the Second Circuit's interpretation of Rule 8 permits any aggrieved claimant to add the offending officials' *supervisors* to his list of defendants in the hope that this fishing expedition will reveal evidence of their culpability. *See Iqbal*, 490 F.3d at 179 (Cabranes, J., concurring). Even prior to discovery, the very filing of such lawsuits burdens supervisory officials because it distracts them from their official duties and requires them to respond to numerous pleadings and litigate their right to qualified immunity at the pleading stage. Indeed, despite the fact that discovery has not yet commenced against the appealing defendants, peti-

tioners and Hasty have had to spend years litigating their qualified immunity defense.[2]

Ultimately, the fact is that *all* of this Court's prior case law – from its interpretation of Rule 8 to its guidance as to the fundamental policies implicated by qualified immunity cases – counsel that Iqbal be required to allege facts supporting the finding of liability against the supervisory officials in this case. The Second Circuit's opinion below was not faithful to these legal principles, and reversal is therefore warranted.

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[2] A parallel case to Iqbal's was filed by other plaintiffs and contains similar allegations. *See Turkmen v. Ashcroft*, No. 1:02-cv-2307 (E.D.N.Y. Apr. 17, 2002). In both that case and this one the district court granted a discovery stay as to those defendants pursuing a qualified immunity defense (such as petitioners and Hasty), while permitting discovery to proceed as to the United States and other defendants. This case thus comes to this Court in a posture where there is no appendix or record to speak of because the debate centers on what is required to be alleged in the complaint. Yet the Plaintiffs in *Turkmen* have filed an *amici* brief reprinting documents they obtained via discovery. *See* Brief for *Amici Curiae* Ibrahim Turkmen, Asif-Ur-Rehman Saffi, Yasser Ebrahim, Hany Ibrahim, Shakir Baloch, Akhil Sachdeva, and Ashraf Ibrahim in Support of Respondent Javaid Iqbal (filed October 31, 2008). This effort to inject documents outside the record into this proceeding by parties who are essentially co-plaintiffs with Iqbal is completely inappropriate in a motion to dismiss setting. *See Carter v. Stanton*, 405 U.S. 669, 671 (reliance on "matters outside the pleadings" is not appropriate in the Fed. R. Civ. P. 12(b)(6) context). This conduct violates the spirit of the Federal Rules of Civil Procedure and should not be countenanced by the Court.

CONCLUSION

This Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

MICHAEL L. MARTINEZ *
DAVID E. BELL
MATTHEW F. SCARLATO
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

* Counsel of Record

Counsel for Respondent Dennis Hasty

November 24, 2008

REPLY BRIEF

13 17

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IN THE

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v.

JAVAID IQBAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR RESPONDENTS MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION, AND KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION IN SUPPORT OF REVERSAL

LAUREN J. RESNICK
FERNANDO A. BOHORQUEZ, JR.
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4200

THOMAS D. WARREN
KARL FANTER
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, OH 44114-3485
(216) 621-0200

Attorneys for Michael Rolince

LESLIE R. CALDWELL
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
(212) 309-6260

BRETT M. SCHUMAN*
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, CA 94105
(415) 442-1000

Attorneys for Kenneth Maxwell

* *Counsel of Record*

2 none 47BR13

ARGUMENT

RESPONDENTS MICHAEL ROLINCE AND KENNETH MAXWELL ARE PARTIES TO THE PROCEEDING ENTITLED TO SEEK AND OBTAIN RELIEF.

Contrary to the argument in footnote six on page 45 of respondent Javaid Iqbal's brief, respondents Michael Rolince and Kenneth Maxwell may seek and obtain relief from this Court based on the questions presented by petitioners John Ashcroft and Robert Mueller.

A. ROLINCE AND MAXWELL MAY OBTAIN RELIEF FROM THIS COURT.

As parties to the proceedings below, Rolince and Maxwell are respondents under Sup. Ct. R. 12.6 to this proceeding and are entitled to relief from this Court. Sup. Ct. R. 12.6 states in relevant part: "All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court. . . . Parties who file no document will not qualify for any relief from this court."

In *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783 n.14 (1980), the Court stated that a party in the proceeding below is "automatically joined as a respondent" when another party seeks certiorari, and, "in that capacity, he may seek reversal of the judgment of the Court of Appeals on any ground urged in [the

circuit] court."[1] *Id.* In *O'Bannon*, the Third Circuit reversed the district court's judgment in favor of two defendants – the Department of Health, Education, and Welfare ("HEW") and the Pennsylvania Department of Public Welfare ("DPW"). Only the DPW, however, filed a petition for a writ of certiorari, which was granted. *Id.* at 783. Nonetheless, because HEW was joined as a respondent, the Court reversed the Third Circuit's judgment with respect to both the DPW and HEW. *Id.* at 783 n.14, 790; *see also Dir., Office of Workers' Comp. Programs, U.S. Dep't Labor v. Perini*, 459 U.S. 297, 304-305 n.12 (1983) (respondent still had a "sufficient interest" in the question presented before the Court, such that he had standing to address the merits of the Court of Appeals decision, even though he had not filed a petition for certiorari).

Here, Rolince and Maxwell were parties to the Second Circuit proceedings, and they have a significant interest in both questions presented as fellow high-ranking Federal Bureau of Investigation ("FBI") supervisors potentially subject to personal liability under *Bivens*. They are seeking reversal of the ruling below on the same grounds – qualified immunity – as they (and petitioners) did in the Court of Appeals.

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[1] *O'Bannon* addressed the predecessor to Sup. Ct. R. 12.6.

B. ROLINCE AND MAXWELL HAVE ADDRESSED ONLY THE QUESTIONS PRESENTED IN THE WRIT OF CERTIORARI AND ARE NOT EXPANDING THE ISSUES BEFORE THE COURT.

Without citation to any authority, Iqbal states that "the questions presented are limited to whether the lower courts properly determined that respondent had adequately alleged claims against [Ashcroft and Mueller]" and that "no Rule permits respondents to expand the questions presented to the Court so as to encompass the sufficiency of the allegations made against each respondent individually." Respondent Iqbal Br. 45. Rolince and Maxwell, however, did not raise additional questions in their opening brief or alter the substance of the questions presented in Ashcroft's and Mueller's petition for writ of certiorari. Rolince and Maxwell, like petitioner Mueller, are high-ranking FBI supervisory officials and are entitled to be held to the same standards to which Mueller is held. In any event, under Sup. Ct. R. 24(1)(a), "[t]he phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents." Rolince's and Maxwell's merits brief argues the same questions as those presented in Ashcroft's and Mueller's petition for a writ of certiorari.

Moreover, as the Solicitor General explains in Ashcroft's and Mueller's petition for a writ of certiorari, Ashcroft and Mueller properly raised the issues encompassed in the questions presented in the Court

of Appeals. Rolince and Maxwell also raised these issues in the Second Circuit and joined Ashcroft's and Mueller's briefing there to the extent it was applicable to Rolince and Maxwell. Reply Brief of Defendants-Appellants at 2 n.1, *Elmaghraby et al. v. Hasty et al.*, 490 F.3d 143 (2d Cir. 2007) (No. 05-5768-cv(L)).

CONCLUSION

Rolince and Maxwell may seek and obtain relief under Sup. Ct. R. 12.6 and relevant precedent. Accordingly, for the reasons set forth in their opening brief, Rolince and Maxwell respectfully request that this Court reverse the Second Circuit's decision affirming the district court's denial of Ashcroft's and Mueller's, and Rolince's and Maxwell's, motions to dismiss Iqbal's First Amended Complaint and direct entry of judgment in favor of Ashcroft, Mueller, Rolince, and Maxwell.

Respectfully submitted,

LAUREN J. RESNICK
FERNANDO A. BOHORQUEZ, JR.
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4200

THOMAS D. WARREN
KARL FANTER
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, OH 44114-3485
(216) 621-0200

Attorneys for
Michael Rolince

LESLIE R. CALDWELL
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
(212) 309-6260

BRETT M. SCHUMAN*
MORGAN, LEWIS & BOCKIUS LLP
One Market,
Spear Street Tower
San Francisco, CA 94105
(415) 442-1000

Attorneys for
Kenneth Maxwell

* *Counsel of Record*

AMICUS CURIAE BRIEF

OCT. 31, 2008

No. 07-1015

IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING RESPONDENT

LES WEISBROD
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW
Suite 200
Washington, DC 20001
(202) 965-3500
President, American Association for Justice

STEPHEN B. PERSHING*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, NW
Suite 520
Washington, DC 20001
(202) 944-2856
steve.pershing@cclfirm.com

*Counsel of Record

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INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") formerly the Association of Trial Lawyers of America, respectfully submits this brief as *amicus curiae* in support of Respondent. This brief is filed with the consent of all parties.[1]

AAJ is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent plaintiffs in personal injury cases and other civil actions, including civil rights actions. AAJ has participated as *amicus* before this Court in dozens of cases of importance to its members and to the public interest. The Association also participates regularly in the advisory committee deliberations and legislative processes by which amendments are made to the Federal Rules of Civil Procedure. Throughout its 62-year history, AAJ has advocated for rules of civil pleading and practice in the United States that accord victims of civil wrongs a full and fair opportunity for legal redress.

SUMMARY OF ARGUMENT

Amicus addresses the first of two questions presented in the petition: whether the qualified immunity of high government officials under *Bivens* must be negated by heightened pleading of specific

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[1] Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *Amicus Curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

facts in a plaintiff's complaint, regardless of whether those facts are available without discovery, in order to satisfy Rule 8(a)(2)..

This Court recognized in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), as it has many times before, that the Rules Enabling Act allows changes to the Federal Rules of Civil Procedure only by the deliberative process set out in that statute and not by judicial decision. *Twombly* respected this principle by affirming repeatedly that its holding should not be read to alter the liberal civil pleading requirements of Fed. R. Civ. P. 8(a)(2), or to heighten those requirements in any sense. *Id.* at 168. *Twombly* emphasized, in an antitrust law context in which circumstantial allegations can suggest lawful and unlawful conduct with equal force, that a Rule 8(a)(2) "showing that the pleader is entitled to relief" is not made out solely on allegations that are consistent with both actionable and non-actionable conduct. Nor may the pleader rely on such equivocal allegations as the sole basis for an empty label or conclusion such as, "These facts constituted negligence." *Twombly* requires further allegations under Rule 8(a)(2) only where the allegations presented suffer from either or both of these deficiencies.

Respondent Iqbal's complaint more than meets Rule 8(a)(2) pleading requirements as its allegations go well beyond the equivocal or conclusory. The complaint directly alleges and specifies the personal involvement of petitioners Ashcroft and Mueller in violations of Iqbal's constitutional rights. It gives these officials fair notice of Iqbal's claims against them, and sets forth in more than sufficient detail

the grounds on which those claims rest. The lower courts were correct to read Iqbal's allegations against General Ashcroft and Director Mueller as plausible under *Twombly*.

The presence of allegations that anticipate or negate a defense, such as qualified immunity, is not a proper test of the sufficiency of the complaint as a pleading. Where the complaint's allegations are so vague or ambiguous that they fail to place a defendant on notice that a defense of qualified immunity may be raised, a court may entertain or invite a motion for more definite statement under Rule 12(e), an option suggested by the Second Circuit in the decision here under review, or it may order a reply to an answer under Rule 7(a)(7), where the answer validly states an inability to discern whether a qualified immunity defense may be available. To hold otherwise, for qualified immunity defenses or any other defenses, would contravene the general rule against requiring complaints to anticipate or negate defenses, and would threaten the entire federal system of notice pleading.

Finally, to hold that a complaint otherwise satisfactory under Rule 8(a)(2) is defective if it fails to plead specific "hidden facts," *i.e.*, facts within a defendant's sole knowledge that will not become available without discovery, traps the plaintiff in a "Catch-22" that is inconsistent with venerated norms of access to courts and fundamental fairness. The same is true for requiring specific allegations of a defendant's intent to discriminate unlawfully, or his or her knowledge of such discrimination by others: to make such a requirement part of the Rule 8(a)(2) sufficiency standard would amount to judicial

alteration of Rule 9(b), which provides that "malice, intent, knowledge, and other condition of mind of a person may be averred generally" to suffice to place the matter in issue. Iqbal's complaint pleads facts sufficient to place these petitioners on notice of his constitutional claims, and to frame whatever qualified immunity defense they wish. The complaint may not be found wanting under Rule 8(a)(2) for lack of specific factual allegations of the time, place, or content of these petitioners' secret deliberations or states of mind concerning the policy that Iqbal validly alleges these petitioners designed, promulgated, and implemented, a policy which subjected him to brutal mistreatment and degradation on account of his race, national origin, and religion in violation of the Constitution.

ARGUMENT

I. THIS COURT HAS SHOWN ITS CONTINUING COMMITMENT TO NOTICE PLEADING UNDER THE FEDERAL RULES.

A. *Twombly* Did Not Change The Pleading Requirements of Rule 8(A)(2), and Could Not Have Done So Under the Rules Enabling Act.

The Rules Enabling Act of 1934, *as amended*, 28 U.S.C. §§ 2071 through 2077, creates an elaborate deliberative process for the adoption and amendment of "general rules of practice and procedure" for the federal courts. 28 U.S.C. § 2073(a). That power is exercised only through procedures for deliberation "prescribe[d]" by the Judicial Conference of the United States. 28 U.S.C. § 2073(a)(1). As the court

held in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997):

> Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered[.]

Id. at 620 (citing 28 U.S.C. §§ 2073, 2074). Just as the Rules themselves may not "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), the courts may not short-circuit the Rules process by judicial decision.

Rule 8(a)(2) as written does not ask for much. It requires merely "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 127 S. Ct. at 1964 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). *Twombly* teaches that there is a critical difference between lack of notice of what the claim is—a claim that "defendant negligently harmed plaintiff," for instance, with not a single further factual allegation to support it, would be fundamentally lacking in that respect—and lack of persuasiveness, evidentiary support, or likelihood of success of clear and well-noticed allegations. The courts will police the former under Rule 8(a)(2), *see, e.g., Briscoe v LaHue*,663 F.2d 713 (7th Cir. 1981) (allegation that defendants conspired to violate constitutional rights with no facts whatever) but not the latter. *Scheuer v. Rhodes*, 416 U.S. 232, 236

(1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely") (cited in *Twombly*, 127 S. Ct. at 1965). Yet the latter—the evidentiary weight of Iqbal's allegations against these petitioners, rather than the clarity of notice that these are his allegations—is the ground of General Ashcroft's and Director Mueller's attempt to have the complaint found wanting. Far from supporting the petitioners' farfetched theory of federal pleading, *Twombly* definitively refutes it.

B. *Twombly* Respects the Principles of Notice Pleading and the Bar to Judicial Amendment of the Rules

The majority opinion in *Twombly* took repeated pains to acknowledge that it was not changing the liberal, permissive Rule 8(a)(2) pleading standard. *Twombly*, 127 S. Ct. at 1973 n.14, 1974 ("we do not apply any 'heightened' pleading standard" and "we do not require heightened fact pleading of specifics").

However, the Court in *Twombly* faced a very real problem: a complaint whose factual allegations of a conspiracy to violate § 1 of the Sherman Act were consistent with both lawful and unlawful conduct. The Court read the complaint to allege such a conspiracy based on equivocal facts alone, which was an insufficient "showing that the pleader is entitled to relief" under Rule 8(a)(2). The Court's response was to draw two lines, and remind plaintiffs that Rule 8(a)(2) required them to cross them both: one between "conceivability" and "plausibility," and the other between "factual neutrality" and "factual suggestiveness." *Twombly*, 127 S. Ct. at 1966 n.5. Pleading defects along those two axes could equally

well be called equivocal allegations and conclusory ones.

1. Equivocal allegations in unique fact situations may call for further pleading.

Twombly presented a unique phenomenon in antitrust law and economics: consciously parallel conduct may indicate independent action, indeed action betokening intense and honest competition, just as readily as it may indicate unlawful collusion among ostensible competitors. *See* Phillip E. Areeda, ANTITRUST LAW ¶ 1402a at 9 (1986) ("setting one's own profit-maximizing price [is] entirely lawful under the antitrust laws," which are "concerned with such price fixing only when it is the subject or result of a conspiracy"). This understanding is the basis for a long-established rule of Sherman Act application that *Twombly* merely reaffirms. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (summary judgment) ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"); *Golden Bridge Tech., Inc. v. Motorola Inc.*, No. 07-40954, 2008 WL 4661807 (5th Cir. Oct. 23, 2008) ("Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the contract, combination, or conspiracy required by § 1.") (citing *Twombly*, 127 S. Ct. at 1964). The complaint in *Twombly* based its inference of an unlawful antitrust conspiracy entirely on lawful parallel conduct. *See Twombly*, 127 S. Ct. at 1971

n.11 (allegations "proceed[ed] exclusively via allegations of parallel conduct") (citation omitted).[2]

Even if *Twombly*'s instruction on equivocal allegations applies beyond the antitrust conspiracy context, the decision should be understood to require further allegations beyond the complaint only where the complaint either does not allege actionable conduct or makes allegations that are consistent with both actionable and non-actionable conduct. Those further allegations may be obtained either via a reply to an answer ordered under Fed. R. Civ. P. 7(a)(7) or a motion for more definite statement entertained or invited under Rule 12(e). To give effect to the Rules' design to make those devices available as part of liberal notice pleading, as the Second Circuit suggested, further allegations should be obtained before dismissing a complaint for Rule 8(a)(2) insufficiency. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007) ("in order to survive a motion to dismiss under the plausibility standard of *Bell Atlantic*, a conclusory allegation concerning some

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[2] Factual phenomena of this type may be relatively rare: circumstantial evidence of unlawful conduct does not typically bolster with equal force the inference that the conduct is emphatically lawful. Thus the sentinel function of *Twombly* may serve only a small class of cases, perhaps limited to antitrust conspiracies and their close relatives. However, regardless of the foregoing, if *Twombly* were read to reach into a broader variety of fact patterns involving states of mind, the decision would collide with Fed. R. Civ. P. 9(b), which provides that "malice, intent, knowledge, or other condition of mind of a person may be averred generally" in federal notice pleading absent a specific, statutorily imposed heightened pleading requirement.

elements of a plaintiff's claims might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement").

2. *Conclusory claim "labels" completely devoid of factual content may add so little to equivocal allegations that they fail to give an adversary fair notice.*

Twombly also stands for a rule against empty, conclusory "label" allegations without a shred of factual content. *Twombly*, 127 S. Ct. at 1964-65 (notice of "grounds" under Rule 8(a)(2) may require "more than labels and conclusions" or "formulaic recitations of . . . a cause of action" even though it does not require "detailed factual allegations"). After *Twombly* as before, a complaint's allegations satisfy Rule 8(a)(2) when they give fair notice of the claim even without pleading specific facts.

These concepts are fully reconciled in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), in which a prisoner plaintiff alleged that prison officials' cessation of his hepatitis C treatment caused "irreversible damage" to his liver and endangered his life. *Id.* at 2199. The court of appeals held those allegations too "conclusory" to set forth "substantial harm" from the cessation of treatment as opposed to the disease itself, an element it held necessary to the plaintiff's Eighth Amendment claim; the court apparently would have required specific medical allegations about the worsening of the plaintiff's liver disease or enumeration of symptoms that cessation of treatment, rather than the disease itself, had caused. *Id.* at 2199-2200. This Court reversed, under *Twombly*, saying the wrongful cessation, irreversible

damage, and life endangerment allegations were sufficient to give "fair notice of the claim and the grounds upon which it rests" without further fact pleading. *Id.* at 2200.

Thus, under Rule 8(a)(2), an allegation that prison officials "harmed the plaintiff," for instance, or even "harmed the plaintiff's medical condition," without more, might not be enough to give fair notice; but an allegation that prison officials "endangered the prisoner's life" by causing "irreversible liver damage" after ceasing to treat him for his hepatitis C in prison is more than sufficient without pleading specific medical sequelae or alleging some particular degree of certainty that the cessation of treatment caused or exacerbated those consequences to a particular degree.

Above all, it continues to be clear that *Twombly* does not permit trial courts to require heightened pleading without express statutory authority. One month after the decision in *Twombly*, this Court held in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007), that even in a securities fraud complaint under Section 21D(b)(2) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(2), the statutory heightened pleading requirement of a "'strong inference' of *scienter*" need only be strong enough that "a reasonable person would deem [it] cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 127 S. Ct. at 2509-2510 (emphasis added). The majority opinion, *id.* at 2510, expressly rejected Justice Scalia's proposed alternative formulation, "whether the inference of scienter (if any) is *more plausible*

than the inference of innocence." *Id.* at 2513 (Scalia, J., concurring). It would reduce the heightened pleading concept to nonsense to equate its requirements with those that govern non-heightened pleading. If the Court is to honor its explicit pronouncement in *Twombly* concerning Rule 8(a)(2) for ordinary pleading, the two cannot be the same: non-heightened pleading requirements must be less severe.

If *Twombly* is to be read consistently with the anti-judicial rulemaking principle of the Rules Enabling Act, the decision cannot have changed Rule 8(a)(2) in any respect—by making it the equivalent of Rule 9(b) on heightened pleading of fraud or mistake; by making it abrogate the provision of Rule 9(b) that "[m]alice, intent, knowledge and other condition of mind of a person may be averred generally"; or, least of all, by using it to invade the province of Rule 56(c), under which genuine disputes of material fact are for the factfinder to resolve at trial. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Indeed,

> Rule 8(a)(2) does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."

Twombly, 127 S. Ct. at 1982 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)).

The lower courts are converging on a reading of *Twombly* that retires the literal "no set of facts" language of *Conley*, as this Court held should occur, and retains the heart and soul of liberal notice pleading under Rule 8(a)(2).

The Second Circuit opinion that *amicus* urges this Court to affirm is not alone. *See, e.g., Mauras v. United States*, 82 Fed. Cl. 295, 299 (Ct. Fed. Cl. 2008) (citing *Twombly*) (issue under claims court's counterpart to Rule 8(a)(2) is "[w]hether [the breach of contract complaint] alleges facts consistent with a claim for breach of contract"); *Phillips v. County of Allegheny*, 515 F.3d 224, 234-35 (3d Cir. 2008), citing Edward H. Cooper, *NOTICE PLEADING: THE AGENDA AFTER TWOMBLY* 5 (Jan. 2008) (unpublished manuscript on file with the Administrative Office of the United States Courts, Rules Committee Support Office), *available at* www.uscourts.Gov/rules/Agendabooks/st2008-01.pdf ("Rule 8(a)(2) has it right").

Twombly did not abandon notice pleading; on the contrary, it affirmed it. *Twombly*, 127 S. Ct. at 1976, 1982, 1984 n.8. The decision merely emphasized that Rule 8(a)(2) requires some sort of showing, dependent on the nature of each claim, that the pleader is entitled to relief on the claim asserted. For conspiracy in antitrust, that showing is some allegation consistent with agreement, which is unlawful, and not just parallel conduct, which is lawful. For *Bivens* actions it is some allegation that the defendant violated a constitutional right. But in neither of these, nor in any other type of civil action, after *Twombly* any more than before, must the required "showing that the pleader is entitled to

relief" include factual allegations beyond the kind described above.

C. Iqbal's Allegations Meet the *Twombly* Test.

In the instant case, Iqbal's allegations against these petitioners are far beyond the narrow category that courts may find wanting under Rule 8(a)(2) after *Twombly*. The highly detailed, 207-paragraph complaint, prepared by competent and sophisticated counsel, contains numerous specific factual allegations about petitioners Ashcroft and Mueller. Compl. ¶¶ 10, 11, 47, 69, 74, 96-97, 195, 205, 232, 235, 250 (Pet. App. 1a-215a); *see also* Iqbal Br. at 47-48. These allegations are anything but equivocal, setting forth the plaintiff's claim that Ashcroft and Mueller "promulgat[ed] the policy" under which he was subjected to the brutally harsh treatment he complained of; that one petitioner "designed" the policy and the other was "instrumental in" its "adoption, promulgation and implementation"; and that both men "were aware of" and "condoned" the selective ADMAX SHU placement of the plaintiff and persons similarly situated based "solely" on the detainees' race, national origin, and religion. Those allegations assert direct personal involvement by both officials and are patently inconsistent with lawful conduct or allegations of mere *respondeat superior* liability. And they are more than conclusory: they specifically set forth the constitutional wrongs committed by these petitioners. It is hard to see, and petitioners avoid suggesting, just what further allegations could be required to assure that Iqbal's complaint was neither equivocal nor conclusory under *Twombly*.

II. A PLEADER CANNOT BE REQUIRED TO ANTICIPATE OR NEGATE A DEFENDANT'S QUALIFIED IMMUNITY OR ANY OTHER AFFIRMATIVE DEFENSE.

For federal civil pleading purposes under Rule 8(a)(2), qualified immunity under Section 1983 or *Bivens* is no different from any other affirmative defense: a pleader cannot be required to anticipate or negate it in order to produce a "short and plain statement of the claim" that satisfies the Rule. *Jones v. Bock*, 127 S. Ct. 910, 919 (2007). This allocation of pleading burdens for affirmative defenses is as old as Rule 8(c), originally enacted with the first federal civil Rules in 1938, which provides that "in pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." *Jones*, the modern Court's up-to-date pronouncement, held that under the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. §§ 1997e *et seq.*, prisoner plaintiffs did not have the burden of pleading the affirmative defense of administrative exhaustion set forth in the statute, even though the defense—where meritoriously raised by defendants—would compel dismissal of the suit under Rule 12(b)(6). *Id.* at 919-21.

Similarly, the allocation to defendants of the responsibility to plead qualified immunity is as old as the defense itself. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Butz v. Economou*, 438 U.S. 478, 485 (1978). *Gomez*, one of the early qualified immunity cases, held simply that "[s]ince qualified immunity is a defense, the burden of pleading it rests with the defendant." *Id.* at 640 (citing 5 Charles Alan Wright & Arthur R. Miller FEDERAL PRACTICE AND

PROCEDURE § 1271 (1969)). "It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith." *Gomez*, 446 U.S. at 640.

Petitioners here contend for a policy-based pleading exception tailored to them, *i.e.*, a shift of the pleading burden to plaintiffs for situations where high government officials assert qualified immunity. However, as *Jones v. Bock* reaffirmed, this Court's settled understanding is that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id.*; *Twombly*, 127 S. Ct. at 919 (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)) (rejecting argument that municipal liability plaintiffs should be required to overcome qualified immunity defense in their pleading) ("that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation").[3]

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[3] The exception sought is arguably tailored so narrowly to the post-September 11 actions of these petitioners as to suggest a claim that they or their actions are above the law. *See* Iqbal Br. at 22, 25-27 (pointing to incoherence of petitioners' proposed special exception to normal pleading requirements based on their status and the security considerations surrounding their post-September 11 decisions). This Court has properly rejected that position in case after landmark case, particularly but not only concerning government actions after the September 11 attacks or the assertions of high officials that they or their important functions should receive special

The long list of affirmative defenses that "shall [be] set forth affirmatively" under Fed. R. Civ. P. 8(c) was "not intended to be exhaustive." 5 Wright & Miller, § 1271 (Supp. 2008) (listing defenses not enumerated). However, no affirmative defense prevails for mere failure of the pleader to plead around it under Rule 8(a)(2). The rule is thoroughly established that whether a complaint states a claim as a matter of pleading is a separate question from whether an affirmative defense against that claim should prevail. *See, e.g., Swierkiewicz*, 534 U.S. at 515, cited in *Twombly*, 127 S. Ct. at 1973-74.

It may seem counterintuitive that an immediate, even absolute defense to a pleader's claim need not be rebutted in the complaint in order to "show" an

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treatment. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229, 2245 (2008) (rejecting Government's contention that habeas corpus was suspended for U.S. detainees at Guantanamo) (citing 1 Frederick Pollock & Frederic W. Maitland, HISTORY OF ENGLISH LAW 173 (2d ed. 1909) (Magna Carta "means this, that the king is and shall be below the law"); *Clinton v. Jones*, 520 U.S. 681, 692 (1997) (holding that president was not entitled to temporary immunity from private legal proceedings while in office); *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982) (holding that presidential immunity from certain damage claims did not "place the president above the law"); *Mitchell v. Forsyth*, 472 U.S. 511, 520-24 (1985) (rejecting view that Attorney General should receive absolute immunity when he claims his actions were motivated by national security concerns) ("the security of the Republic" will not be threatened if high government officials "on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States").

"entitle[ment] to relief" under Rule 8(a)(2). However, if the pleading allocation rule were otherwise, and a plaintiff were required to plead around all possible affirmative defenses or suffer dismissal before the defendant ever had to litigate any such defenses, federal notice pleading as we know it would cease to exist. Instead complaints could be dismissed for a plaintiff's failure to account at the threshold for every defense, in law or fact, that an adversary might be able to erect. Defenses would no longer be adjudicated on their merits, but complaints would be subject to dismissal or procedural default for failure to plead around them. The result would be exhumation of all the hobgoblins of pleading formalism that the Federal Rules were promulgated to inter. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909 (1987) (discussing Rules framers' desire to replace pre-1938 pleading formalism with more permissive system designed to reach merits of disputes more easily).

This Court has "refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense." *Crawford-El*, 523 U.S. at 595. This and all other affirmative defenses must be pleaded by the party asserting them, as has been true since the advent of the Rules. *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971) (claim and issue preclusion); *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 714-15 (8th Cir. 2008) (preemption); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899 (7th Cir. 2004) (statute of limitations); *Bentley v. Cleveland County Bd. of County Comm'rs*, 41 F.3d 600, 604

(10th Cir. 1994) (qualified and absolute immunity); *Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1580 (2d Cir. 1994) (failure to mitigate damages); *Starcraft Co. v. C.J. Heck Co. of Texas, Inc.*, 748 F.2d 982, 990-992 (5th Cir. 1984) (circuitous action); *Green v. James*, 473 F.2d 660, 661 (9th Cir. 1973) (absolute immunity); *Railway Exp. Agency v. Mallory*, 168 F.2d 426, 427-28 (5th Cir. 1948) (contributory negligence); *Continental Collieries v. Shober*, 130 F.2d 631, 635-36 (3d Cir. 1942) (statute of frauds).

As the lower courts understand from *Twombly* and *Crawford-El*, "[t]he pleading standard is no different simply because qualified immunity may be raised as an affirmative defense." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1090 (7th Cir. 2008) (citing *Twombly* and *Crawford-El*, 523 U.S. at 595).

Even if the qualified immunity of high officials alleged to have committed grave violations of the Constitution is imagined in theory to be worthy of a dangerous judicial exception to the rules of pleading, any such exercise is a classic slippery slope best avoided by not beginning the descent. The federal courts' approach, specifically sanctioned in *Leatherman*, 507 U.S. at 168-69, and carefully managed by the lower courts in the present case, has been to subject claims against high government officials to strict discovery controls but not to extinguish them altogether. *See, e.g., In re Papandreou*, 139 F.3d 247, 254-55 (D.C. Cir. 1998) (order of District Court ordering deposition of Greek ministers reversed); *Ahearn v. Rescare West Virginia*, 208 F.R.D. 565 (S.D. W. Va. 2002) (deposition of regional director of NLRB not allowed); *Murray v.*

County of Suffolk, 212 F.R.D. 108 (E.D.N.Y. 2002) (deposition of county police commissioner not allowed); *Shirley v. Chestnut*, 603 F.2d 805, 807 (10th Cir. 1979) (protective order issued in favor of governor); *Peoples v. U.S. Dep't of Agriculture*, 427 F.2d 561, 566 (D.C. Cir. 1970) (deposition of cabinet officer generally not allowed); *Wirtz v. Local 30, Intern'l Union of Operating Engineers*, 34 F.R.D. 13 (S.D.N.Y. 1963) (deposition of cabinet official precluded). The same approach is effective with regard to private persons in high positions. *See, e.g., Stelor Productions, Inc. v. Google, Inc.*, No. 05-80387-CIV, 2008 WL 4218107 (S.D. Fla. Sept. 15, 2008) (Rule 30(b)(6) deposition of Google official would be ordered before depositions of Google's founders sought by plaintiff even as to matters uniquely within their personal knowledge).

III. TO REQUIRE PLEADING OF FACTS THAT ARE INACCESSIBLE TO PLAINTIFFS WITHOUT DISCOVERY IS INCONSISTENT WITH FUNDAMENTAL FAIRNESS.

Chief Justice Marshall recognized the centrality of access to justice in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

The requirements of pleading do not in and of themselves deny access to the courts in a constitutional sense. *Christopher v. Harbury*, 536 U.S. 403, 417-18 (2002) (access to courts claim must

itself be pleaded in a manner that satisfies Rule 8(a)(2)). Even heightened pleading requirements imposed by statute or rule to give a defendant fair notice are not unconstitutional *per se*, although the gravamen of *Swierkiewicz* was that under principles of federal notice pleading, access to one's day in court should not be defeated by such requirements. *Swierkiewicz*, 534 U.S. at 513-15, *cited in* Christopher Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 590-91 & n.295 (2002); *see also Crawford-El*, 523 U.S. at 585 (rejecting heightened pleading requirement beyond Rule 9(b) for state of mind allegations that lower court had adopted to give notice of matters "easy to allege and hard to disprove").

The access to justice problem that should concern the Court here is that the *de facto* heightened pleading requirement proposed by petitioners would penalize respondent Iqbal for his inability to allege "hidden facts," *i.e.*, facts within the petitioners' sole knowledge that are inaccessible to a plaintiff without discovery. In the run of cases it will be difficult or impossible for an ordinary plaintiff to plead, for instance, the content of a high official's specific thoughts at a given time or place, or the specific times, places, or contents of high-level meetings or conversations that by nature are extremely sensitive, confidential, and known only to a few inside the government. To force a pleader to allege the content of those secrets in order to avoid dismissal of a complaint that otherwise satisfies Rule 8(a)(2) is an intolerable Catch-22 restriction on access to justice.[4]

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[4] *See* Joseph Heller, *CATCH-22* 46 (Simon & Schuster 1961) (describing self-contradicting circularity of fictional

On petitioners' theory of pleading advanced herein, the higher the office, public or private, that the defendant occupies, and the more secret and less accessible to the plaintiff is direct evidence of the wrongdoing he or she is able to allege indirectly or circumstantially, the more perfectly insulated is the alleged wrongdoer—potentially hiding serious constitutional harms.

Such a rule effectively would accord such officials absolute immunity from suit, a protection greater than the qualified immunity that *Harlow* held was sufficient to protect them and their functions from unwarranted assault. *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982) (no absolute immunity for high executive branch officials). It is precisely the principle of access to courts for redress that kept the Court in *Harlow* from raising qualified immunity to absolute. *Id.* at 807 (stressing "the importance of a damages remedy to protect the rights of citizens"), *citing Economou*, 438 U.S. at 504-505.

Even in cases with heightened pleading requirements, courts have taken care not to place litigants in paralyzing double binds of pleading. An excellent example is *Emery v. American General*

World War II military rule that although insanity was a ground for release from combat missions, and an aviator "had to be crazy" to fly such missions in view of their extreme risk, he could never be spared them because to ask for the dispensation was proof of his sanity, and sanity precluded relief). *Cf. Giles v. Harris*, 189 U.S. 475 (1903) (holding, in a decision since discredited, that black citizen had no valid claim to be added to a voter roll he alleged was void because it excluded blacks).

Fin., Inc., 134 F.3d 1321, 1323 (7th Cir. 1998) (civil RICO) (Posner, J.), where the court held:

> We don't want to create a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery (normally of the defendant, because the essential information is in his possession and he will not reveal it voluntarily) that she could not conduct before filing the complaint. But Rule 9(b) is relaxed upon a showing of such inability. . . . Rule 9(b) is satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery.[5]

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[5] Judge Posner showed sensitivity to the catch-22 problem in a related heightened pleading context in *Tregenza v. Great American Commc'ns Co.*, 12 F.3d 717, 721 (7th Cir. 1993), in which the plaintiff was caught between Rule 9(a) pleading-with-particularity requirements and the statute of limitations under Section 9(e) of the 1934 Securities Act which required that suit be filed within a year of discovery of "the facts constituting the violation." To wait long enough to acquire "actual knowledge" that fraud was occurring might exceed the limitations period; to file suit earlier on lesser suspicions (known as "inquiry notice") might make the pleading requirements impossible to meet. Judge Posner's solution in *Tregenza* was to affirm the inquiry notice measure of accrual for limitations purposes, but implicitly to accept that pleading such notice would have been sufficient even for the heightened pleading required by Rule 9(b), *id.* at 722—and either way that a complaint could not be required to negate affirmative defenses to satisfy pleading rules. *Id.* at 718.

Similar decisions from other courts include *Ouaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990) (plaintiff satisfies Rule 9(b) if she makes "allegations [concerning facts that] lie peculiarly within the opposing parties' knowledge and [those allegations] are accompanied by information that raises a strong inference of fraud."); *Craftmatic Securities Litigation v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1990) (allowing plaintiffs to proceed on the basis of unsubstantiated allegations made on information and belief when "the necessary information lies within defendants' control"); *In re Ashanti Goldfields Securities Litig.*, 184 F. Supp. 2d 247, 258 (E.D.N.Y. 2002) (finding defendant's internal documents unnecessary to make securities fraud pleadings sufficient under Rule 9(b)). In *Ashanti*, the court held:

> [H]eightened pleading requirements often put plaintiffs in a Catch-22 in securities fraud cases. Many plaintiffs do not have access to internal documents of the entities against which they wish to file claims, but those documents are the best way to demonstrate the alleged fraud. In effect, the heightened pleading requirement in many cases prevents plaintiffs from conducting the discovery they need to meet the requirement.

Id. at 258 (citing Elliott J. Weiss & Janet E. Moser, *Enter Yossarian: How To Resolve The Procedural Catch-22 That The Private Securities Litigation Reform Act Creates*, 76 WASH. L.Q. 457, 500-01 (1998)) (noting that even under the defendant-

protective Private Securities Litigation Reform Act, courts must still allow limited, particularized discovery on a showing that the information needed to substantiate the fraud claim is within the defendant's sole possession). *See also* Note, *Pleading Securities Fraud Claims with Particularity under Rule 9(b)*, 97 HARV. L. REV. 1432, 1436-38 (1984). If courts can apply even heightened pleading requirements with care to avoid the Catch-22 described here, surely they should do so where Rule 9(b) does not require heightened pleading.

Finally, it may be possible to infer "hidden facts" and allege them in good faith in a manner that satisfies Fed. R. Civ. P. 11 without satisfying the pleading standard that petitioners would have the Court require. That Rule provides that a party's or attorney's signature on a pleading or other paper attests that its factual allegations "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after an opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). The "opportunity" language just quoted would not make much sense, nor would its inclusion in the Rules as applicable to all cases, if the real floor of Rule 8(a)(2) for any category of case were higher, *i.e.*, if pleadings were always to be stricken for want of more than the minimum Rule 11 contemplates litigants will be able to submit in good faith. Under Rule 8(a)(2), as it should be understood for all allegations not subject to heightened pleading by statute or rule, the real floor is where Rule 11(b)(3) puts it, but only for the allegations that Rule 8(a)(2) requires a pleader to make. The Rules do not create a double standard, nor should this Court permit government defendants, no matter how highly

placed, to interpolate one as it suits them. Consistency with the Rules, with notice pleading principles, and with the values of access to the courts described herein require allegations to be deemed sufficient on the time-honored Rule 8(a)(2) "short and plain statement" standard that this Court has repeatedly affirmed does not require heightened pleading.

CONCLUSION

For the foregoing reasons, *amicus* American Association for Justice urges that the decision of the Second Circuit be affirmed.

October 31, 2008

Respectfully submitted,

STEPHEN B. PERSHING
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 Sixth Street, NW
Suite 520
Washington, DC 20001
(202) 944-2856
steve.pershing@cclfirm.com

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,
Petitioners,

v.

JAVAID IQBAL, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF WILLIAM P. BARR, GRIFFIN BELL, BENJAMIN R. CIVILETTI, EDWIN MEESE III, WILLIAM S. SESSIONS, RICHARD THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Paul J. Larkin, Jr.
1314 Cleveland St.
Alexandria, VA 22302
(703) 931-1704

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Mass. Ave, NW
Washington, DC 20036
(202) 588-0302

Date: September 5, 2008

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20002

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QUESTION PRESENTED

1. Whether a conclusory allegation that a cabinet-level officer or high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

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BRIEF OF WILLIAM P. BARR, GRIFFIN BELL, BENJAMIN R. CIVILETTI, EDWIN MEESE III, WILLIAM S. SESSIONS, RICHARD THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The *amici curiae* are five former Attorneys General, a former Director of the FBI, and a public interest law firm. [1] They believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. They are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of insubstantial constitutional claims.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Griffin Bell served as Attorney

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties – including all defendants who participated in proceedings before the appeals court – have consented to the filing of this brief; letters of consent have been lodged with the clerk.

General of the United States from 1977 to 1979. He also served as a federal judge on the United States Court of Appeals for the Fifth Circuit from 1961 to 1976.

The Honorable Benjamin R. Civiletti served as Attorney General of the United States from 1979 to 1981. He also served as Assistant Attorney General for the Criminal Division from 1977 to 1978 and as Deputy Attorney General from 1978 to 1979.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable William S. Sessions served as Director of the Federal Bureau of Investigation (FBI) from 1987 to 1993. He also served as a federal judge on the United States District Court for the Western District of Texas from 1974 to 1987, serving as Chief Judge of that court from 1980 to 1987; and was the United States Attorney for the Western District of Texas from 1971 to 1974. From 1969 to 1971, he was the Chief of the Government Operations Section of the Justice Department's Criminal Division.

The Honorable Richard Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. It regularly appears in this and other federal

courts to support the litigation immunity rights of public officials.

STATEMENT OF THE CASE

Respondent Javaid Iqbal is a citizen of Pakistan who has filed a civil action in United States courts, seeking to recover damages for alleged mistreatment while being held during 2002 at a federal detention facility in Brooklyn on federal criminal charges. Iqbal ultimately pleaded guilty to those charges and was removed to Pakistan following completion of his sentence. Among those he seeks to hold responsible for his alleged mistreatment are Petitioners John D. Ashcroft (the United States Attorney General at the time of Iqbal's detention) and Robert Mueller (who was then, and still is, Director of the Federal Bureau of Investigation). Iqbal does not allege that either Ashcroft or Mueller directed subordinates to take any specific actions with respect to Iqbal or that either was even aware of his case.

Iqbal alleges that he was arrested on federal charges on November 2, 2001 and was thereafter housed in the general population unit at the Metropolitan Detention Center in Brooklyn (MDC) until January 8, 2002. Pet. App. 169a, ¶¶ 80-81. From that date until the end of July 2002, Iqbal was housed in MDC's Admax special housing unit, a maximum-security unit created at MDC in the wake of the 9/11 terrorist attacks to house federal prisoners deemed "of high interest" in the post-9/11 terrorism investigation. *Id.* Iqbal was returned to MDC's general population in July 2002 after the FBI cleared him of involvement in terrorist activity. Iqbal pleaded guilty to criminal charges (defrauding the

United States) in April 2002, was sentenced in September 2002, and was released from the MDC in January 2003.

Following completion of his sentence and his removal to Pakistan, Iqbal filed suit in May 2004 against a large number of federal officials, including Ashcroft and Mueller. The suit included statutory claims as well as constitutional claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Iqbal complains both about the conditions of his confinement and about the initial decision to move him to the Admax unit. He alleges that he was assigned to Admax even though there was no evidence that he had links to terrorists and solely because of his religion (Islam), race, and/or nationality.

Iqbal's claims alleging mistreatment while in Admax are directed primarily at defendants who were employed at MDC in 2002; these causes of action do not list Ashcroft and Mueller as defendants. Among the claims directed at those two defendants, three remain: (1) a *Bivens* claim that they violated his First Amendment rights by imposing harsher conditions of confinement because of his religion, Pet. App. 201a-202a; (2) a *Bivens* claim that they violated his Fifth Amendment rights to equal protection of the laws by imposing harsher conditions of confinement because of his race/nationality, *id.* 202a-203a; and (3) claims under 42 U.S.C. § 1985(3) that they conspired to deny him his civil rights because of his religion, race, and/or nationality. *Id.* 206a-209a.

The Second Circuit affirmed the denial of Ashcroft's and Mueller's immunity claims in relevant

part. *Id.* 1a-70a. The appeals court recognized that "[q]ualified immunity is an immunity from suit and not just a defense to liability," *id.* 13a, and that some of Iqbal's allegations "suggest that some of [his] claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement." *Id.* 25a. The court nonetheless concluded that Iqbal's allegations were sufficiently specific to withstand a motion to dismiss based on qualified immunity. *Id.* 58a-65a.

Judge Cabranes wrote a separate concurring opinion. *Id.* 67a-70a. While agreeing with the other panel members that existing precedents pointed toward the result reached by the appeals court, he warned:

> [L]ittle would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

Id. 69a-70a.

SUMMARY OF ARGUMENT

Qualified immunity not only provides government officials with a defense to liability; it also is "an entitlement not to stand trial or face *the other burdens of litigation.*" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that

"'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet, the decision below calls into question the ability of high-level Executive Branch officials to win dismissal, on qualified immunity grounds, of even frivolous *Bivens* litigation filed by anyone claiming to be aggrieved by their official conduct. In the absence of dismissal, those officials face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities. As former senior Executive Branch officials, the individual *amici curiae* share Judge Cabranes's concerns regarding the disruptive effects of such discovery, and they are very concerned by the effects that such disruptions are likely to have on the ability of high-level officials to carry out their missions effectively.

I. Although the complaint alleges that Ashcroft and Mueller discriminated against Iqbal based solely on his religion, race, and/or national origin, it does so only in the most conclusory of terms. It does not allege that they directed others to take actions with respect to Iqbal or that they ever knew of his existence. Rather, it alleges that they were in some way responsible for policies mandating that those matching Iqbal's religious/racial/ethnic profile be subjected to discriminatory treatment. Remarkably, however, the complaint alleges no facts suggesting that Ashcroft and Mueller had any involvement in the adoption of such policies; indeed, it does not allege any facts indicating that the Department of Justice ever actually adopted a discriminatory policy of the sort described in the complaint.

The conclusory allegations of the complaint do not even meet the level of factual specificity required by

Fed.R.Civ.P. 8(a) in order to "set[] forth a claim for relief" and thereby defeat a motion to dismiss. The Second Circuit held that a complaint is sufficient to withstand a motion to dismiss so long as allegations in the complaint -- no matter how conclusory – render at least "plausible" a conclusion that the defendant violated the plaintiff's constitutional rights. That holding is not a fair reading of the Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which interpreted Rule 8(a)(2) as requiring a complaint to make a "'showing,' rather than a blanket assertion, of an entitlement to relief." 127 S. Ct. at 1965 n.2.

In any event, Iqbal's claims do not even rise to the level of plausibility. The Second Circuit held that Iqbal made a sufficient "showing" of the personal involvement of Ashcroft and Mueller in the alleged religious, race, and nationality discrimination by alleging in general terms that they "were instrumental in adopting the policies and practices challenged here" and "maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin." Pet. App. 62a. Yet, the appeals court conceded that Iqbal "acknowledges" that subordinate FBI officials – not Ashcroft and Mueller – made the decision to classify Iqbal as a "high interest" detainee. *Ibid.* More importantly, wholly absent from the amended complaint are any factual allegations regarding what Ashcroft and Mueller did to merit being labeled "instrumental" in the adoption of the alleged policies and practices or to have "maliciously agreed" to Iqbal's placement in the Admax unit. In other words, there are no factual allegations that answer such basic questions as "when," "where,"

"how," and "with whom" Ashcroft and Mueller are supposed to have involved themselves in the decision to subject Iqbal and/or others to harsh prison conditions based solely on their religion, race, and/or nationality. In the absence of such factual allegations, *Twombly* dictates that the complaint be dismissed for failure to set forth a claim for relief.

II. The deficiencies in the complaint are compounded when one takes into account that the motion to dismiss arises in connection with an assertion of qualified immunity. The qualified immunity doctrine is designed to ensure that public officials can carry out their governmental functions without fear that their time and reputations will later be squandered by vexatious lawsuits brought by those wishing to second-guess their good-faith decisions. It is not a mere defense to liability but an immunity from the burdens of litigation. It is effectively lost if the case is permitted to proceed through discovery and/or trial. Accordingly, the Court has repeatedly admonished that immunity questions be resolved at the earliest possible stage in litigation. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

Yet, it is impossible to resolve the issues critical to deciding a qualified immunity motion to dismiss – *i.e.*, whether facts alleged by the plaintiff demonstrate that government officials violated his constitutional rights and whether those rights were clearly established at the time of the challenged action – unless the plaintiff has made specific factual allegations and not merely conclusory allegations that his constitutional rights were violated. As the Court made clear in *Anderson*, qualified immunity is "a guarantee of immunity," not a mere "rule of pleading." *Anderson*, 483 U.S. at 639.

Once a defendant has asserted a qualified immunity defense, it is incumbent on the plaintiff – in order to defeat a motion to dismiss – to make sufficient factual allegations to demonstrate that the defendant violated his clearly established constitutional rights. A generalized allegation of misconduct may be sufficient to meet the Fed.R.Civ.P. 8 pleading requirement if it provides a defendant with fair notice of the basis for the claim, but *Anderson* explained that a plaintiff responding to a qualified immunity defense may not avoid dismissal by responding at a high level of generality – such as asserting without accompanying factual allegations that the defendant discriminated against the plaintiff based on religious, racial, or ethnic animus. In the absence of factual allegations, a court is not in a position to determine whether *specific actions* that the defendant is alleged to have taken violated a clearly established constitutional right and thus that immunity is unwarranted.

In rejecting Ashcroft and Mueller's claim that Iqbal was required to provide factual allegations in order to defeat a motion to dismiss based on qualified immunity, the appeals court cited several decisions of this Court that have rejected imposition of heightened pleadings requirements in all but the limited categories of cases specified in Fed.R.Civ.P. 9(b). But virtually all of those cases did not involve qualified immunity claims. The only cited case that did involve qualified immunity – *Crawford-El v. Britton*, 523 U.S. 574 (1998) – is readily distinguishable. *Crawford-El* involved a prison inmate whose complaint included numerous factual claims regarding specific actions allegedly taken by prison officials. The courts were thus in a position to determine whether the specific actions alleged violated

a clearly established constitutional right. In contrast, Iqbal has pointed to no specific actions of either Ashcroft or Mueller but rather has made conclusory allegations that at some unspecified occasion they adopted a policy that ultimately resulted in his being treated in a discriminatory manner. Such conclusory allegations cannot be deemed sufficient to withstand a qualified immunity motion to dismiss.

III. The decision below is an unwarranted expansion of potential liability under *Bivens*. Ashcroft and Mueller – as well as Judge Cabranes in his concurring opinion below – have articulated numerous policy reasons why denial of qualified immunity under the facts of this case would impede the efficient operation of government. When qualified immunity defenses have arisen in the context of claims asserted against State and local government officials under 42 U.S.C. § 1983, the Court has expressed reluctance to base its decisions on such policy considerations in the absence of guidance from Congress. *See Crawford-El*, 523 U.S. at 597; *id.* at 601 (Kennedy, J., concurring). But *Bivens* actions, unlike suits filed under § 1983, are a judicial creation. Accordingly, it is wholly appropriate for the Court to determine the contours of a *Bivens* action. In order to ensure that federal officials are not deprived of the opportunity to have their qualified immunity claims decided at the earliest possible stage of a lawsuit, the Court should hold that a *Bivens* plaintiff – to survive a motion to dismiss based on qualified immunity – must provide factual allegations sufficient to demonstrate a violation of clearly established constitutional rights. A conclusory allegation that the defendant violated constitutional rights cannot be sufficient. A federal official, before being required to

defend a *Bivens* lawsuit, must be provided with sufficient details of his alleged misconduct to allow him to attempt to demonstrate that his alleged actions did not violate any clearly established rights.

IV. The Second Circuit held alternatively that Iqbal could prevail on his *Bivens* claims by demonstrating that Ashcroft and Mueller were "grossly negligent" in supervising subordinate officials within the Justice Department and the FBI, regardless whether they had actual knowledge of any constitutional violations committed by those subordinates. This Court has expressly rejected expansion of *Bivens* to encompass such supervisory liability. The purpose of *Bivens* is to deter federal officers from committing constitutional violations. *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 70 (2001). But as the Court has explained, if *Bivens* is expanded to permit suit not only against the officer that has acted wrongfully but against his supervisor or employer as well, a *Bivens* plaintiff will be less likely to target the officer – thereby undercutting *Bivens*'s deterrent purpose. *Id.* at 70-71; *Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 485 (1994).

ARGUMENT

I. THE DECISION BELOW IMPROPERLY PERMITS COMPLAINTS TO PROCEED TO DISCOVERY BASED ON MERE CONCLUSORY ASSERTIONS OF WRONGDOING

The Court has long recognized that significant burdens are imposed on government officials when they

are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Harlow v. Fitzgerald, 457 U.S. 800, 817 n.29 (1982) (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

In light of those costs, it is particularly important for federal courts to weed out insubstantial claims against high-level government officials before discovery commences, by dismissing those complaints that do not meet Fed.R.Civ.P. 8(a)'s requirement that they "set[] forth a claim for relief." The Second Circuit failed to fulfill that gatekeeping function in this case; it applied an overly lenient interpretation of Rule 8(a). Even without taking into consideration Ashcroft's and Mueller's qualified immunity defense, the complaint against them should not have been permitted to go forward.

Fed.R.Civ.P. 8(a)(2) requires a complaint to

include "a short and plain statement of the claim showing that the pleader is entitled to relief." While that rule eliminated the requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (emphasis added), the rule:

> [S]till requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (*Rule 8(a)* "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Twombly, 127 S. Ct. at 1965 n.3.

Twombly held that Rule 8(a) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. *Id.* at 1965. It held that requiring plausibility "reflects the threshold requirement of *Rule 8(a)(2)* that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966. The Court explained that a test requiring plausibility is not so strict as to require "probability" but nonetheless requires more than that the allegations

are merely possible or conceivable. *Id.* at 1966, 1974.[2]

The Second Circuit was able to find that Iqbal met *Twombly*'s "plausible grounds" standard only by stripping that standard of all its heft. The amended complaint includes *no* factual assertions to support its conclusory allegations that Ashcroft and Mueller "knew of," "condoned," and "agreed to" the allegedly discriminatory treatment of Iqbal. While conceding that the amended complaint includes no "allegation of subsidiary facts," the appeals court deemed the claims

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[2] *Twombly* involved claims that several telecommunications companies had violated Sherman Act § 1, 15 U.S.C. § 1, by agreeing among themselves to oppose entry by rivals and not to enter each other's geographic territories. The Court held that the plaintiffs' claims did not meet Rule 8(a)'s pleadings standards. It began its analysis by noting that liability under Sherman Act § 1 requires proof of "a contract, combination, or conspiracy." 127 S. Ct. at 1963. The Court added that "an allegation of parallel conduct and a bare assertion of conspiracy," *id.* at 1966, does not constitute "a short and plain statement of the claim showing that the pleader is entitled to relief" under Fed.R.Civ.P. 8(a)(2). A plaintiff need not include "detailed factual allegations" in a complaint, but "more than labels and conclusions" are necessary, and "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964. An allegation must cross two lines to be sufficient: "the line between the conclusory and the factual," and the line between "the factually neutral and the factually suggestive." *Id.* at 1966 n.5. The Court concluded that the principal fact asserted by the plaintiffs to support their conspiracy allegation – that the defendants had engaged in parallel conduct by failing to initiate competition in their rivals' geographic service areas – did not create "plausible grounds to infer agreement." *Id.* at 1965. *Twombly* said that where there is an "obvious alternative explanation" for the facts alleged other than a conspiracy, it is error to allow a complaint to go forward based on the notion that the facts allow the inference that there was an unlawful agreement. *Id.* at 1792.

against Ashcroft and Mueller to be plausible because of the importance placed by the Justice Department on its post-9/11 investigation.[3] In other words, instead of providing Executive Branch officials greater deference when national security issues are at stake, the Second Circuit cited the fact that the case raises important national security issues as a reason to permit *increased* judicial scrutiny of the conduct of high-level officials. It concluded that Iqbal's complaint was "plausible" based on nothing more than a supposition that Ashcroft and Mueller *might* have had some involvement in the decision to place him into restrictive conditions of confinement.

The Second Circuit's understanding of what constitutes a "plausible" claim cannot be squared with *Twombly*. *Twombly* made clear that the mere possibility that the allegations of a complaint are true is not sufficient to meet the requirements of Rule 8(a). While it is theoretically possible that Ashcroft and Mueller, while in the midst of directing the most massive anti-terrorist operation in American history, took the time to concern themselves with the precise criteria employed by underlings in determining which New York-area detainees should be deemed of "high interest" (and thus should be placed in MDC's Admax unit), Iqbal has included nothing in his complaint to suggest that that

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[3] The court deemed the allegations of personal involvement "plausible" in light of "the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." Pet. App. 62a.

scenario is plausible.

Indeed, a number of facts alleged in the complaint undercut Iqbal's conclusory assertion of direct involvement by Ashcroft and Mueller. Iqbal admits that he was not deemed a "high interest" detainee and moved to the Admax unit until January 8, 2002, more than two months after his arrest and detention at MDC. If, at the direction of Ashcroft and Mueller, DOJ had adopted a policy that *all* detainees matching Iqbal's religious/racial/ethnic profile were to be designated "high interest" detainees and held in solitary confinement, then one would expect that Iqbal – whose profile was not a secret at the time of his arrest – would have been placed immediately into MDC's Admax unit. The fact that subordinate federal officials waited two months to designate him a "high interest" detainee and move him to that unit suggests that Ashcroft and Mueller had not issued such a blanket policy.

The appeals court also cited, as "additional factual support" for Iqbal's discrimination claims, the amended complaint's allegation that "'within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following investigative leads into the September 11th attacks – however unrelated the arrestee was to the investigation – were immediately classified as "of interest" to the post-September 11 investigation.'" Pet. App. 61a (quoting amended complaint ¶ 52). But even if true, that allegation provides no support for Iqbal's claims. It took a finding that an MDC detainee was "of *high* interest" – not merely "of interest" – before the detainee was placed in MDC's Admax unit. Accordingly, the alleged policy of which Iqbal complains does not add

plausibility to his claim that he was transferred to the Admax unit for discriminatory reasons.[4] More importantly, the allegation that such a policy existed tends to undercut the allegation of direct involvement by Ashcroft and Mueller. If senior DOJ officials based in Washington, D.C. had adopted a detailed policy regarding which federal detainees were to be deemed "of high interest" in the post-September 11 investigation, one would expect that policy to apply uniformly nationwide. Iqbal's allegation that Arab Muslim men were treated in a discriminatory manner *in the New York area* therefore suggests that the alleged official policy of discrimination originated among federal officials based in New York, not out of Ashcroft's and Mueller's offices in Washington.

In determining that the amended complaint met Rule 8(a)'s pleading standards, the Second Circuit relied principally on two recent decisions of this Court: *Crawford-El* and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Neither decision is apposite. *Swiekiewicz* held that when a Title VII plaintiff alleges that he was discharged based on discriminatory animus, he meets the requirements of Rule 8(a) without having to assert specific facts to support the claim of discriminatory motive; it is enough that he clearly alleges the discriminatory act in question (in that case, discharge from employment). 534 U.S. at 515. *Crawford-El* held that when an inmate alleges that a prison official took

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[4] Moreover, Iqbal is a citizen of Pakistan and not of Arab descent. Thus, an allegation that federal investigators were discriminating against Arabs because of their racial/ethnic background does not support an allegation that Iqbal himself was discriminated against.

adverse action against him in retaliation for the inmate's exercise of First Amendment rights, the inmate need not assert facts demonstrating that the defendant harbored retaliatory intent; it was enough that the prisoner identified the specific adverse action allegedly taken by the prison official. 523 U.S. at 592. The Second Circuit concluded that *Swierkiewicz* and *Crawford-El* required it to accept at face value Iqbal's allegation that Ashcroft and Mueller acted with discriminatory intent. Pet. App. 61a.

That conclusion misses the mark. The issue is not whether Ashcroft and Mueller harbored discriminatory motives when they took action with respect to Iqbal. Rather, the issue is whether they took any actions *at all* with respect to Iqbal. In the absence of any factual allegations rendering it more than a theoretical possibility that Ashcroft and Mueller were directly involved in the decision to place Iqbal into the Admax unit, the amended complaint fails to meet Rule 8(a)'s pleading requirements, and *Twombly* requires dismissal of the complaint.

II. THE COURTS BELOW ERRED IN FAILING TO ORDER DISMISSAL BASED ON QUALIFIED IMMUNITY

The deficiencies in the complaint are compounded when one takes into account that the motion to dismiss arises in connection with an assertion of qualified immunity. The qualified immunity doctrine is designed to ensure that public officials can carry out their governmental functions without fear that their time and reputations will later be squandered by vexatious lawsuits brought by those wishing to second-guess their

good-faith decisions. It is not a mere defense to liability but an immunity from the burdens of litigation. Accordingly, when a suit seeks to hold a government official personally liable for injuries incurred as a result of performance of a discretionary function, the district court must ensure that the plaintiff has included sufficient factual allegations to demonstrate both that the complaint meets the minimum pleading requirements established by *Twombly* and that the alleged misconduct is sufficiently egregious to warrant rejection of the government official's immunity defense.

Since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it has been firmly settled that government officials exercising discretionary authority are shielded from personal damages liability and suit insofar as their conduct does not violate the plaintiff's "clearly established" constitutional rights. Four principles guide the answer to the question of whether the law was "clearly established" at the time of the challenged action and thus whether a government official is entitled to a qualified immunity defense.

First: the *Harlow* qualified immunity standard is an objective one that does require consideration of the state of mind of the defendant government official. Inquiry into a government official's state of mind imposes special costs on the individuals involved, their colleagues, and the government as well.[5] For that rea-

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[5] *Harlow* explained:

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the

son, *Harlow* made clear that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818; *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

Second: The objective reasonableness of a government official's conduct is to be analyzed in light of the specific facts confronting him – not at the wholesale level by abstractly considering the relevant legal issue (e.g., "Are warrantless searches generally lawful?"), but at the retail level by considering the specific facts facing the particular decisionmaker (e.g., "Is this warrantless search clearly unlawful?). *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 819. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (emphasis added); *Mitchell v. Forsyth*, 472 U.S. at 528 (officials are immune unless "the law clearly proscribed the actions" they took). The upshot is that qualified immunity does not sanction knowing illegality, but does protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

> risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to 'subjective' inquiries of this kind.

Harlow, 457 U.S. at 816-17.

Third: The inquiry is whether a defendant acted reasonably in the particular course that he chose, not whether another reasonable person could have acted differently or whether there is another reasonable action that this defendant could have pursued. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Courts should determine whether the defendant reasonably could have believed that his conduct was lawful, not whether there was a less restrictive way to accomplish the same goal or whether another official would have chosen a different path.[6] The qualified immunity doctrine does not demand that government officials choose among several reasonable alternative views of the law or foresee future legal developments. As the Court explained, on the one hand, if the law at the time an action occurred was not "clearly established," then "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. On the other hand, if the law was "clearly established," then the defense ordinarily should fail, "since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19. "[W]hether an official protected by qualified immunity may be held personally

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[6] Application of qualified immunity does *not* mean that damages never will be available. For instances in which claims of qualified immunity have been rejected, *see, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 563-66 (2004); *Hope v. Pelzer*, 536 U.S. 730, 742-46 (2002). A senior government official who directs adoption of a policy that is facially unconstitutional (*e.g.*, a wholly arbitrary policy such as one directing agents to "round up the usual suspects") would not be entitled to qualified immunity in a case brought by one injured by that policy.

liable for an allegedly unlawful official action generally turns on the objective reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson*, 483 U.S. at 639 (citation and punctuation omitted). "The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law." *Id.* at 646 (citation omitted).

Fourth: A claim of qualified immunity can and should be resolved early in the process, almost always before trial, as part of a motion to dismiss or for summary judgment. *Harlow*, 457 U.S. at 818 ("Until this threshold immunity question is resolved, discovery should not be allowed."). "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' . . . The privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' As a result, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (citations omitted).

This case involves an important corollary to those principles: namely, a qualified immunity claim cannot be defeated simply by broad allegations that a government official, particularly a Cabinet-level federal official, was generally responsible for the allegedly unconstitutional actions of a subordinate. As explained below, the issue is not simply whether a plaintiff has alleged sufficient facts to satisfy the Fed.R.Civ.P. 8(a) requirements necessary to state a claim, but whether a supervisory official can be denied qualified immunity absent a clear allegation that he committed, authorized, or approved specific misconduct by a subordinate. On the facts alleged here, Ashcroft and Mueller cannot be denied such immunity. When a complaint, as here, does no more than make conclusory allegations that senior officials approved a policy that ultimately resulted in the plaintiff being treated in a discriminatory manner, the complaint has failed to demonstrate that they acted in violation of "clearly established" constitutional rights in light of the specific facts confronting the officials.

The Court's decision in *Anderson v. Creighton* is instructive on this issue. *Anderson* involved a *Bivens* action against an FBI agent who conducted a warrantless search of an occupied house in the belief that a bank robbery suspect might be found inside. Reversing an appeals court decision to the contrary, the Court held that the FBI agent would be entitled to judgment as a matter of law on his qualified immunity claim without regard to whether the search was lawful, so long as he could establish as a matter of law that a reasonable officer could have believed the search to be lawful. *Anderson*, 483 U.S. at 644. The plaintiffs claimed that Fourth Amendment case law "clearly established" that warrantless searches were unlawful

unless: (1) there was probable cause for the search; and (2) exigent circumstances excused the failure to obtain a warrant. The Court responded that the plaintiff was approaching the "clearly established law" issue at far too high a level of generality, noting that when viewed at that level of generality, *any* action that violates the Constitution can be said to violate a "clearly established right." *Id.* at 639. The Court explained:

> But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Ibid. Rejecting that approach, the Court said, "[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

Anderson makes clear that resolution of a qualified immunity defense requires a reviewing court to determine whether the plaintiff alleges that the defendant took specific actions that a reasonable official would have understood, based on specific facts known to the official at the time of his actions, violated the

plaintiff's rights. A particularized inquiry of that type is impossible, of course, unless the complaint sets forth factual allegations with sufficient specificity to allow the reviewing court to determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202. Accordingly, in the absence of such factual allegations, it cannot be demonstrated that the government officer acted in a manner that he should have understood was in violation of the plaintiff's rights. Under those circumstances, *Anderson* requires dismissal of the complaint prior to discovery. 483 U.S. at 646 n.6. In that way, *Anderson* safeguards the benefits of the qualified immunity doctrine by mandating that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis added).

In light of the conclusory nature of the allegations against Ashcroft and Mueller, they are entitled to qualified immunity. They are alleged to have adopted an unspecified policy that led to Iqbal being placed into solitary confinement because of his religion, race, and nationality. But by failing to answer such basic questions as "when," "where," "how," and "with whom" Ashcroft and Mueller are supposed to have involved themselves in the decision to subject Iqbal to harsh prison conditions, the complaint does not adequately allege that they violated clearly established law. Iqbal cannot reasonably argue that Ashcroft and Mueller were flatly prohibited from taking religion, race, and nationality into account in deciding who should be deemed "of high interest." For example, given that all those involved in the September 11 attacks were Muslims, reasonable officials in Ashcroft's and Mueller's

positions would have had no reason to doubt the legality of a policy of giving closer scrutiny to Muslims than to non-Muslims. The conclusory allegations of the complaint are deficient because they fail to demonstrate that it should have been clear to Ashcroft and Mueller that their conduct was unlawful in the context of the specific situation they confronted.[7]

A requirement that a plaintiff offer a reasonable factual basis for the allegation that a senior federal official authorized or approved specific misconduct by a subordinate is not tantamount to the type of "heightened pleading standard" that this Court rejected in *Leatherman v. Tarrant County Narcotics & Intelligence Unit*, 507 U.S. 163 (1993), and *Swierkiewicz*. Neither ruling involved the issue of qualified immunity under *Harlow*, so neither decision is controlling. As *Anderson* makes clear, a rule guaranteeing immunity to government officials is not to be deemed the equivalent of "a rule of pleading" and

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[7] *Crawford-El*, in which the Court overturned dismissal of claims against prison officials alleged to have improperly retaliated against an outspoken prisoner, is factually distinguishable. The plaintiff in that case made numerous factual allegations that provided support for a claim that reasonable officials would have known that the alleged conduct violated clearly established constitutional rights – including circumstantial evidence that they diverted the plaintiff's property in retaliation for his having exercised First Amendment rights. 523 U.S. at 598. Indeed, the Court explicitly authorized courts, before permitting such suits against a government official to continue into the discovery phase, to "insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury." *Ibid.* (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

may not be converted "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." 483 U.S. at 639.

III. THE DECISION BELOW IS AN UNWARRANTED EXPANSION OF POTENTIAL LIABILITY UNDER *BIVENS*

No federal statute creates a private right of action for alleged violation of one's federal constitutional rights under color of federal law. Instead, Iqbal asks the Court to "imply" a private right of action in this case under the line of cases that began with *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). But in recent decades the Court has repeatedly expressed reluctance to expand the scope of *Bivens* actions in the absence of guidance from Congress. In a 2001 decision, the Court noted that since 1980 it had "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. The Court recently explained that creation of "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* action unjustified." *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007).

For all the reasons articulated by Judge Cabranes in his concurring opinion, *amici* respectfully submit that this is an appropriate case to refrain from extending *Bivens* to create a private right of action under the circumstances of this case. As Judge Cabranes

explained, if a private right of action is recognized under these circumstances:

> [I]t is possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and a possible jury trial, regarding Iqbal's claims. If so, these officials – FBI Director Robert Mueller and former Attorney General John Ashcroft – may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic. . . . Even with the discovery safeguards carefully laid out in Judge Newman's opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

Pet. App. 69a-70a.

The Court has never before considered whether assertion of a qualified immunity defense should bar recognition of a *Bivens* action against high-level federal officials in the absence of detailed factual allegations of

misconduct by those officials. When the issue arose in the context of damage claims against State and local government officials brought pursuant to 42 U.S.C. § 1983, the Court expressed reluctance to expand the qualified immunity defenses of such officials as a means of preventing the distractions created by the many insubstantial suits filed under § 1983, stating that any such expansion should be initiated by Congress. *Crawford-El*, 523 U.S. at 597. The Court nonetheless recognized that there were sound reasons for such expansion in cases hinging on proof of an improper motive. As Justice Kennedy (who provided the fifth vote for the majority in *Crawford-El*) acknowledged in his concurring opinion, the dissent raised "serious concerns" about the ability of artful § 1983 pleaders to nullify the qualified immunity defense;[8] he stated that the proliferation of insubstantial § 1983 suits "foster[s] disrespect for our laws" and "disdain for the judicial system." *Crawford-El*, 523 U.S. at 601 (Kennedy, J., concurring). But because it was Congress that created the § 1983 right of action against State and local government officials, Justice Kennedy stated that any solution to those serious concerns "lies with the Legislative Branch, not with us." *Ibid.*

But *Bivens* actions, unlike suits filed under § 1983, are a judicial creation. Accordingly, it is wholly appropriate for the Court to determine the contours of a *Bivens* action. *Wilkie v. Robbins*, 127 S. Ct. at 2597

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[8] *See Crawford-El*, 523 U.S. at 605 (Rehnquist, C.J., dissenting) ("any minimally competent attorney (or *pro se* litigant) can convert any adverse decision into a motive-based tort, and thereby subject government officials to some measure of intrusion into their subjective worlds.").

(judicial recognition of such actions "has to represent a judgment about the best way to implement a constitutional guarantee"). In order to ensure that federal officials are not deprived of the opportunity to have their qualified immunity claims decided at the earliest possible stage of a lawsuit, the Court should hold that a *Bivens* plaintiff – to survive a motion to dismiss based on qualified immunity – must provide factual allegations sufficient to demonstrate a violation of clearly established constitutional rights. A conclusory allegation that the defendant violated constitutional rights cannot be sufficient. A federal official, before being required to defend a *Bivens* lawsuit, must be provided with sufficient details of his alleged misconduct to allow him to assert his qualified immunity by demonstrating that his alleged actions did not violate any clearly established rights.

To be sure, a defendant in a *Bivens* action must plead qualified immunity as an affirmative defense, *Gomez v. Toledo*, 446 U.S. 635 (1980), but he is not required to prove that he acted lawfully. On the contrary, senior federal officials like Ashcroft and Mueller are entitled to the benefit of the presumption that government officials have acted lawfully. *See, e.g., Reno v. ARAC*, 525 U.S. 471, 489-90 (1999); *United States v. Armstrong*, 517 U.S. 456, 463-65 (1996); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Absent a plaintiff's detailed factual allegations to the contrary, such officials are entitled to pre-discovery dismissal of a *Bivens* claim based on qualified immunity.

IV. SUPERVISORY FEDERAL OFFICIALS MAY NOT BE HELD LIABLE UNDER *BIVENS* FOR THE MISCONDUCT OF THEIR SUBORDINATES

The Second Circuit held alternatively that Iqbal could prevail on his *Bivens* claim by demonstrating that Ashcroft and Mueller were "grossly negligent" in supervising subordinate officials within the Justice Department and the FBI, regardless whether they had actual knowledge of any constitutional violations committed by those subordinates. This Court has expressly rejected expansion of *Bivens* to encompass such supervisory liability.[9]

The purpose of *Bivens* is to deter federal officers from committing constitutional violations. *Malesko,* 534 U.S. at 70. But as the Court has explained, if *Bivens* is expanded to permit suit not only against the officer that

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[9] Despite Iqbal's assertions to the contrary, the supervisory liability issue is properly before the Court. Iqbal asserted in his brief opposing the petition for certiorari that Ashcroft and Mueller had waived the issue by failing to raise it in their Second Circuit brief. But the appeals court explicitly relied on supervisory liability as an alternative basis for its affirmance of the district court's denial of the qualified immunity motion to dismiss. Pet. App. at 14a, 62a (it did not matter that Iqbal admitted that Ashcroft and Mueller were not the ones who made the determination that he was of "high interest," because that admission "d[id] not necessarily insulate Ashcroft and Mueller from personal responsibility for the actions of their subordinates under the standards of supervisory liability outlined" in the appeals court's decision.). Ashcroft and Mueller thereafter made the supervisory liability issue the focus of the second Question Presented in the petition, and the Court granted review on that question. Accordingly, the supervisory liability issue is properly before the Court.

has acted wrongfully but against his supervisor or employer as well, a *Bivens* plaintiff will be less likely to target the officer – thereby undercutting *Bivens*'s deterrent purpose. *Id.* at 70-71; *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. at 485. Barring *Bivens* actions against federal supervisors alleged to have failed to properly supervise subordinate officials who violated a plaintiff's constitutional rights will not leave the plaintiff without recourse for the wrong inflicted on him – he will still be permitted to seek recovery from the subordinate official. More importantly, barring *Bivens* suits based on claims of inadequate supervision will ensure that high-level Executive Branch officials will not face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities.

Moreover, *amici* are unaware of any prior federal appellate decision – and the Second Circuit has pointed to none – in which a high-level Executive Branch official has been held to answer in a *Bivens* action asserting liability based on constructive notice of wrongdoing by his/her subordinates. In the absence of such precedent, Ashcroft and Mueller are entitled to dismissal of any claim based on supervisory liability, because *Bivens* liability based on such claims cannot be said to have been "clearly established" at the time of Iqbal's detention in the Admax unit in 2002.

CONCLUSION

Amici curiae request that the Court reverse the decision of the court of appeals.

Respectfully submitted,

Paul J. Larkin, Jr.
1314 Cleveland St.
Alexandria, VA 22302
(703) 931-1704

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Mass. Ave, NW
Washington, DC 20036
(202) 588-0302

Dated: September 5, 2008

AMICUS CURIAE BRIEF

Oct. 31, 2008

No. 07-1015

IN THE SUPREME COURT OF THE UNITED STATES

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,
Petitioners

v.

JAVAID IQBAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* JAPANESE AMERICAN CITIZENS LEAGUE, PAKISTANI AMERICAN PUBLIC AFFAIRS COMMITTEE, SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM, AND MUSLIM ADVOCATES IN SUPPORT OF RESPONDENT

Raymond H. Brescia
Albany Law School

JOHN E. HIGGINS
Counsel of Record
Nixon Peabody LLP
677 Broadway, 10th Floor
Albany, New York 12207
518-427-2704

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Japanese American Citizens League (JACL), the Sikh American Legal Defense and Education Fund (SALDEF), the Pakistani American Public Affairs Committee (PAKPAC), the National Korean American Service & Education Consortium (NAKASEC), and Muslim Advocates, sister entity to the National Association of Muslim Lawyers (NAML) are a diverse group of bar associations, civil rights, civil liberties, public affairs, and not-for-profit organizations dedicated to the principles of equal protection, due process, and the rule of law for every person in the United States of America, including but not limited to minorities, under the Constitution and laws of the United States.[2]

As part of our dedication to these concerns, *Amici* are all committed to protecting the civil rights, liberties and freedoms guaranteed by the Constitution for racial, ethnic and religious minorities, aliens and citizens of America alike. The interests of *Amici* in the fundamental constitutional

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1 No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are lodged herewith.

2 A more detailed statement of the specific interests of each *amicus* is contained in the Appendix to this brief.

and jurisprudential issues raised in the present case are thus aligned with those of respondent and are substantial.

SUMMARY OF ARGUMENT

This case is before the Court to resolve two narrow questions raised by petitioners related to the sufficiency of respondent's First Amended Complaint under the Federal Rules of Civil Procedure. The corollary issues raised by the Petition, however, including petitioners' claims they are immune from all discovery related to respondent's *Bivens* claims of unconstitutional discrimination, give rise to two competing, sometimes conflicting national values. On the one hand "is the importance of a damages remedy to protect the rights" of respondent and other persons under the Constitution and laws of the United States. *Butz v. Economou*, 438 U.S. 478, 504-05 (1978). On the other is "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.* at 506.

The appropriate balance between these important and conflicting values was struck by the Court of Appeals, and should be similarly balanced by this Court, in favor of the respondent's right to proceed with limited discovery against petitioners on his substantial constitutional claims. These claims -- that respondent and other Muslim and/or Arab men were intentionally targeted, detained and mistreated under discriminatory orders created, issued and/or implemented by petitioners after having been classified as "of high interest" to the

Government's investigation into the attacks on September 11, 2001 because of race, ethnicity, national origin, and religion – must be viewed in their proper context and in light of the historic mistreatment of minorities by the Government in times of national crisis. When properly viewed in this context, *Amici* respectfully submit that the Court's "task [is] simple, [its] duty clear," *Korematsu v. United States*, 323 U.S. 214, 223 (1944), and the Second Circuit's decision must be affirmed.

STATEMENT OF THE CASE

In the months after the attacks of September 11, 2001, the Federal Bureau of Investigation ("FBI"), under the direction of petitioner Robert Mueller, "arrested and detained thousands of Arab [and] Muslim men (designated herein as 'post-September 11 detainees') as part of its investigation into the attacks." Appendix to Petition for a Writ of Certiorari ("App.") 75a-76a. The respondent in this case, Javaid Iqbal, a Pakistani citizen of the Muslim faith never accused of or charged with any terrorist activities in connection with the September 11 attacks or otherwise was one of many Muslim and/or Arab men so detained.

At issue here are respondent's allegations of unconstitutional mistreatment while he was detained for a period of more than six months in a severely restrictive federal prison at the Metropolitan Detention Center ("MDC") in Brooklyn, New York, referred to as the "ADMAX SHU" (short for Administrative Maximum Special Housing Unit), created specifically for the purpose

of housing post-September 11 detainees like respondent deemed to be "of high interest" to the Government's investigation. App. 76a. Also at issue is whether the respondent, who alleges that his "of high interest" classification and his related detention and mistreatment in the ADMAX SHU were based solely on his race, ethnicity, national origin, and religion, is entitled to at least limited discovery on his constitutional discrimination claims related to the petitioners' alleged conduct in creating, participating in, ratifying, endorsing and serving as principal architects of the policies which caused respondent's alleged "systematic mistreatment" pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Many facts related to the detention and mistreatment of respondent and other Muslim and/or Arab men while they were detained in the ADMAX SHU are set out in respondent's pleadings. *See, e.g.*, App. 154a-156a, 170a-172a, 176a-177a, 181a, 183a-184a, 185a-187a. (First Amended Complaint ("Compl.") ¶¶ 1-4, 84-91, 112-22, 137-40, 153-54, 164-71). There, respondent has put forth in considerable detail the factual bases for his claims against petitioners, including facts and claims regarding their allegedly discriminatory actions and conduct or misconduct. *See, e.g.*, App. 154a-156a, 157a-159a, 164a, 165a, 168a-170a, 172a-173a, 183a, 190a-191a, 193a-194a, 201a, 202a-204a, 206a-207a, 208a-209a, 213a-214a (Compl. ¶¶ 1-4, 10-17, 46-49, 52-54, 69-70, 74-75, 80-86, 96-98, 151-52, 195-200, 205-06, 232, 235-36, 238-39, 247-48, 250-51, 267-69).

The clear, specific, and detailed factual allegations contained in these paragraphs of respondent's Complaint, as correctly observed by both the District Court and the Second Circuit, must be accepted as true in the current posture of this litigation, "drawing all reasonable inferences in [respondent's] favor." App. 12a (internal citation omitted).

Although other facts related to petitioners' knowledge and motivation at the relevant time have yet to be uncovered, certain additional facts central to this case, including historical facts never disputed by petitioners in these proceedings regarding their personal involvement in and ultimate responsibility for creating the discriminatory governmental policies at issue here, have now been investigated and well-documented by the Office of the Inspector General ("OIG") of the United States Department of Justice ("DOJ"). *See, e.g.,* United States Department of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003)("April 2003 OIG Report"). Both the District Court below (*see* App. 76a) and the petitioners in their brief have relied upon this OIG report. *See* Brief for Petitioners, pp. 2, 3, 33.

The OIG was charged by the President, in Section 1001 of the USA Patriot Act (Pub. L. No. 107-56 (2001)), signed into law on October 26, 2001, about six weeks after the attacks of September 11, to review claims of civil rights and civil liberties violations by DOJ employees. *See* April 2003 OIG Report, p. 3 n. 6. Since the release of the April 2003

OIG Report in June 2003, the OIG has issued a number of supplemental reports, as well as regular reports to Congress required by the Patriot Act, regarding the mistreatment of post-September 11 detainees like respondent in the ADMAX SHU. *See, e.g., OIG Report to Congress on Implementation of Section 1001 of the USA Patriot Act* (July 17, 2003)("Report to Congress"); and the OIG's *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (December 2003)("OIG Supplemental Report"). All of these reports, and the OIG's findings, are today part of the historic public record of events plainly related to this case.

Included in the April 2003 OIG Report is undeniable evidence of the discriminatory impact which the Government's far-reaching post-September 11 investigative and detention policies, practices and procedures had on Arab and Muslim men, like the respondent.[3] According to the OIG's investigation, as of April 2003, it was estimated conservatively that between September 11, 2001 and August 6, 2002, more than 700 aliens were rounded

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[3] As a Pakistani Muslim, respondent is "not an Arab." App. 4a. Nonetheless, "his claim is fairly to be understood as alleging unlawful treatment based on his ethnicity, even if not technically on a racial classification." *Id.* Moreover, respondent's claim, and "his allegations of what was done to Arab Muslims are fairly understood to mean that unlawful actions were taken against him because officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab." *Id.*

up, arrested, and detained as a result of the investigation launched immediately after the September 11 attacks by petitioners Ashcroft, as former United States Attorney General, and Mueller, as Director of the FBI. *See* April 2003 OIG Report at 2.

Many post-September 11 detainees were from Pakistan, Egypt, and other Arab or Muslim countries. In fact, although "[t]he September 11 detainees were citizens of more than 20 countries[,] [t]he largest number, 254 or 33 percent, came from Pakistan, more than double the number of any other country." OIG Report at 21. "The second largest number (111) came from Egypt," while "[n]ine detainees were from Iran and six from Afghanistan." *Id.*

As in respondent's case, most of these detainees deemed to be "of high interest" were apparently never charged or accused of any terrorist activities, but they were nevertheless held for varying periods of time under incredibly restrictive conditions in the ADMAX SHU. *Id.* at 27. It was there, according to the respondent and many other post-September 11 detainees kept in the ADMAX SHU whose complaints were investigated by the OIG, that a series of unconstitutional deprivations took place, for which the respondent seeks redress from the petitioners, former Attorney General Ashcroft and FBI Director Mueller, and others downstream from them within the DOJ and FBI and the federal Bureau of Prisons (BOP).

As correctly explained by the District Court, respondent alleges that, while confined in the ADMAX SHU, he was "subjected to, among other things, severe physical and verbal abuse; unnecessary and abusive strip and body-cavity searches; extended detention in solitary confinement; deliberate interference with the exercise of [his] religious beliefs; and deliberate interference with [his] attempts to communicate with counsel." App. 73a-74a, 79a-80a. Similar claims of mistreatment made by other post-September 11 detainees in the ADMAX SHU have been made in well-publicized reports of alleged civil rights violations committed in the wake of September 11. *See, e.g.*, "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," Human Rights Watch (August 2002); and "A Year of Loss: Reexamining Civil Liberties Since September 11," Lawyers Committee for Human Rights (September 5, 2002).

More significant than these are certain supporting findings, as well as corroborating evidence, contained and referred to in the April 2003 OIG Report and the Supplemental OIG Report about the systematic and daily mistreatment of post-September 11 detainees. All of these findings, including but not limited to evidence corroborating respondent's claims that he suffered from religious interference and harassment because of his Islamic faith while detained in the ADMAX SHU (see OIG Report at 147-48), strongly suggest that respondent's claims of discrimination against petitioners and other defendants remaining in this action are not merely "possible," but plausible, as discussed below.

Consistent with respondent's claims in this case, the April 2003 OIG Report determined, among other things, in its chapter on the "Conditions of Confinement at the Metropolitan Detention Center in Brooklyn, New York," that "fear of additional terrorist attacks in New York City and around the country changed the way aliens detained in connection with the investigation of September 11 attacks were treated." April 2003 OIG Report at 111. The April 2003 OIG Report also determined, *inter alia*, that:

> (1) the DOJ "did not initially give the [federal Bureau of Prisons] any guidance on how to confine the detainees" (*id.* at 112);
>
> (2) certain high-ranking officials within the Attorney General's Office knew that detainees were being held under "the most secure conditions possible" and approved of these conditions (*id.* at 112-13);
>
> (3) "detainees in the ADMAX SHU [were] restricted to their cells, ha[d] limited use of telephones with strict frequency and duration restrictions, and can only move outside their cells for specific purposes and while restrained and accompanied by MDC staff" (*id.*);
>
> (4) "MDC officials relied on the FBI's assessment that the detainees generally were 'of high interest' to its ongoing terrorism investigation and automatically placed them

in the MDC's most restrictive housing conditions" (*id.* at 126);

(5) "MDC staff . . . believed that the September 11 detainees who were sent to the MDC were 'suspected terrorists'" even though "the FBI did not have a formal process for making an initial assessment of a detainee's possible links to terrorism, and this assessment lacked specific criteria and was applied inconsistently" (*id.* at 126-27);

(6) there were inconsistencies in detainee assignment and reassignment procedures (*id.* at 129-30);

(7) the "decision to house September 11 detainees in the most restrictive confinement conditions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel" (*id.* at 130);

(8) detainees were prevented or impeded from visiting with family members (*id.* at 138); and

(9) contact by detainees with foreign consulates was also inhibited (*id.* at 140, 141).

Also relevant here are findings contained in the OIG reports supporting respondent's essential claims that (1) petitioner Ashcroft, as the Attorney General, had "ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws" and was "a principal architect of the policies and practices challenged

here" as "[h]e authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions under which [respondent and other detainees like him] were detained" (App. 157a); and (2) petitioner Mueller, as Director of the FBI, "was instrumental in the adoption, promulgation, and implementation of the[se] policies and practices." (*Id.*).

For example, according to the OIG Report, almost immediately after the September 11 attacks, the FBI initiated a "massive investigation," called PENTTBOM, "focused on identifying the terrorists who hijacked the airplanes and anyone who aided their efforts." April 2003 OIG Report at 1. The OIG also found that almost immediately after the attacks took place, "the Attorney General directed the FBI and other federal law enforcement personnel to use 'every available law enforcement tool' to arrest persons who 'participate in, or lend support to, terrorist activities.'" *Id.* (quoting from a Memorandum from petitioner Ashcroft entitled "Anti-Terrorism Plan," dated September 17, 2001). Pursuant to petitioner Ashcroft's Anti-Terrorism Plan, "[o]ne of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism." *Id.*

Respondent alleges it was pursuant to these policy directives and orders that he was deemed to be "of high interest" to the government's terrorism investigation, and it was as a result of this classification that respondent was kept in the ADMAX SHU, with the knowledge of the petitioners

and at their direction, "under harsh conditions, solely because of his race, ethnicity, and religion." App. 59a. In fact, respondent alleges, among other things, as the Second Circuit also observed, that petitioners, along with the other defendants originally named as such, "specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." *Id.* As result of this alleged systematic discriminatory treatment of respondent and other similarly situated Muslim and/or Arab men detained as "of high interest" to the government's investigation, respondent maintains that the petitioners, *inter alia*, violated his civil rights in violation of the First, Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution.

ARGUMENT

POINT I

WHEN VIEWED IN THEIR PROPER HISTORICAL CONTEXT, RESPONDENT'S CONSTITUTIONAL DISCRIMINATION CLAIMS AGAINST PETITIONERS ARE ENTIRELY PLAUSIBLE

A. This is Not the First Time That the Government Has Detained and Violated the Well Established Constitutional Rights of Minorities in the Name of National Security

In a number of recent cases decided since the September 11 attacks, this Court has considered the detention and treatment of persons detained as "enemy combatants" by the Executive Branch in the wake of the Government's self-declared "Global War

on Terror." *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 554-55 (2004)(observing that "freedom from indefinite imprisonment at the will of the Executive" is at the "very core of liberty" in our "system of separated powers"); *Boumediene v. Bush*, 128 S.Ct. 2229, 2242 (2008)(rejecting the Government's efforts to exclude the constitutional right of *habeas corpus* for Guantanamo Bay detainees); *Rasul v. Bush*, 542 U.S. 466 (2004)(holding that foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay have the statutory right to challenge their detention in federal district courts). In each of these cases, the Court has made it clear "that a state of war is not a blank check for the President." *Hamdi*, 542 U.S. at 536 (O'Connor, J.). The Court has likewise made it clear that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Id.* at 532 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-165 (1963)).

In each of these cases, the Court necessarily considered the historical context within which the Government's actions in a time of national crisis have been challenged. *See, e.g. Hamdi*, 542 U.S. at 600 (noting that "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of

others who do not represent that sort of threat"). Similarly here, a proper historical context is critically important to the Court's evaluation of respondent's claims, as well as of petitioner's claims of qualified immunity.

In fact, as petitioners concede: "Determining whether a given set of alleged facts is sufficient to state a claim is not possible in the abstract. Rather such allegations must be considered in the particular context of the specific claims being raised, and thus 'context' will affect 'the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations.'" Petitioners Brief at 27. The District Court agreed, explaining that this case may not be viewed in a vacuum (App. 76a), but must be viewed in the context of what we now know (largely thanks to the OIG's investigation and reports) about the Government's response to the September 11 attacks, and the petitioners' participation in and involvement in the detention and treatment of aliens considered "of high interest" in the ADMAX SHU.

Amici further submit that respondent's claims of systemic governmental discrimination because of his race, ethnicity, national origin and religion, and the petitioners' asserted defenses of qualified immunity, must also be viewed in a deeper historical and jurisprudential context that began long before September 11, for this is not the first time in America's history where due process and basic constitutional guarantees were denied to a group of persons based solely on their race, national origin, ethnicity and/or religion. And this is not the first

time this Court has been called upon, in a similar context involving a time of national crisis and panic, to review the plainly discriminatory actions of high-ranking government officials taken in the name of national security.

Sixty-five years ago, in *Hirabayashi v. United States*, 320 U.S. 81 (1943), this Court was asked to determine whether a war-time curfew imposed on Japanese citizens and aliens on the West Coast of the United States in response to the attacks on Pearl Harbor by the Japanese air force on December 7, 1941 unconstitutionally discriminated against persons of Japanese ancestry in violation of the Fifth Amendment. The Court considered these claims in their historical context and "in light of the conditions with which the President and the Congress were confronted" at the time, noting that the United States was at war with Japan and that many of these asserted conditions, "since disclosed, were then peculiarly within the knowledge of the military authorities." *Id.* at 93-94.

Regrettably, the Court then gave the government a constitutional pass in light of the exigent war-time circumstances then existing and the relatively "mild and temporary deprivation of liberty" found to be at issue (323 U.S. at 241), and out of deference to the Government's assertions of military necessity for their actions. In the process, however, the Court in *Hirabayashi* was careful to explain certain otherwise bedrock principles, with Justice Stone rightly exclaiming that:

> **Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.**

320 U.S. at 100 (emphasis added); *see also* concurring opinion of Murphy, J., likewise observing that "[d]istinctions based on color and ancestry are utterly inconsistent with our traditions and ideals." *Id.* at 110.

A little more than one year later, in *Korematsu v. United States*, 323 U.S. 214 (1944), this Court revisited certain of the assumptions upon which *Hirabayashi* was based. This time though, the issue was the constitutionality of another, far more devastating deprivation of individual and personal liberty for persons of Japanese ancestry in America like, Fred Korematsu, who were ordered by the government excluded because of their ancestry from remaining in certain designated "military areas" in the months after the Pearl Harbor attacks.

Again in *Korematsu*, as in *Hirabayashi*, this Court sided with and deferred to the Government in refusing to strike down a facially discriminatory exclusion order that singled out an entire race of people based on their Japanese ancestry. In so doing, the Court found that there was no racial discrimination involved. Of course, on the record

currently before this Court, with no discovery yet conducted of the petitioners, it is far too early to leap to any such ultimate factual conclusion here. Nevertheless, in finding there was no unlawful discrimination in *Korematsu*, the Court deferred to certain unjustified and never proven assumptions made by the Government about the loyalty of all persons of Japanese descent in the United States to Japan at a time of war with America, and to certain misrepresentations made by the Government both at trial and subsequently before this Court, about the need for the internment of nearly 120,000 aliens and citizens of Japanese ancestry.

We now know, however, thanks to the subsequent investigation and report of the Commission on Wartime Relocation and Internment of Civilians, established by Congress in 1980 to review the treatment and detention of those of Japanese ancestry during World War II, "that military necessity did not in fact warrant the exclusion and detention of ethnic Japanese." *Korematsu*, 584 F. Supp at 1416. We also know now that there was considerable evidence to the contrary (including internal memoranda and letters to and/or from high-ranking officials in the Attorney General's Office at that time), which was never disclosed and which was later determined to have been concealed by the Government both at trial and before this Court on the critical issue of military necessity for the mass-internments and detentions of the Japanese on American soil. *See* Nelson Lund, *Symposium on Confronting Realities: the Legal, Moral, and Constitutional Issues Involving Diversity: Panel I: Racial Profiling; the Conservative*

Case Against Racial Profiling in the War on Terrorism, 66 Alb. L. Rev. 329, 339-40 (2003) ("Not only did the government continue to defend the program, it concealed from the Supreme Court what it knew about the absence of any real threat").

This governmental misconduct in *Korematsu* eventually resulted in the vacating of Mr. Fred Korematsu's conviction by the trial judge after that conviction was affirmed by this Court. *See Korematsu*, 584 F. Supp. 1406, 1416-19 (N.D. Cal. 1984)(granting Korematsu's petition for a writ of *coram nobis*). But it was not until forty years after *Korematsu* was decided by this Court that the government's misconduct in putting "a selective record before this Court and the trial court was corrected by the trial judge. *Id.* For this reason and others, this Court's decision in *Korematsu* has been described as "an anachronism in upholding overt racial discrimination as 'compellingly justified.'" *Id.* at 1420 (also observing, as noted by former Justice Powell in *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980), that *Korematsu* and *Hirabayashi* are the "[o]nly two of this Court's modern cases [to] [hold] the use of racial classifications to be constitutional").

But as Judge Patel further noted in her 1984 decision, this Court's decision in "*Korematsu* remains on the pages of our legal and political history" for whatever limited precedential value it may have. *Korematsu*, 584 F. Supp. at 1420. And, before all of *Korematsu's* teachings are cast aside, the Court should recall that, in language no less as emphatic than *Hirabayashi's* strongly worded condemnation of odius racial distinctions, this Court

again explained in *Korematsu*, in no uncertain terms, that racially motivated governmental restrictions imposed on aliens and citizens solely because of their race are inherently suspect and anathema to the ideals of freedom and liberty guaranteed by the Constitution. As Justice Black explained at the outset of the decision in *Korematsu*:

> It should be noted, to begin with, that ***all legal restrictions which curtail the civil rights of a single racial group are immediately suspect***. That is not to say that all such restrictions are unconstitutional. It is to say that ***courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.***

323 U.S. at 216 (emphasis added).

These principled and unequivocal statements are more than merely dicta. They are, on the contrary, fundamental principles reflective of the well-established idea, embedded in Fifth Amendment's Due Process Clause and in the Equal Protection Clause of the Fourteenth, that "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Hirabayashi v. United States*, 320 U.S. at 100. *Amici* also maintain that these basic principles are as easily understood today by reasonable people as they would have been 65 years ago when *Korematsu* was decided by this Court, as clearly prohibiting intentional racial

discrimination by the Government even in times of war.

Petitioners do not contend otherwise, and they have not argued here that their allegedly discriminatory conduct, if indeed that is what it was, would not have violated clearly established statutory and constitutional rights which a reasonable person would have known. Nor would any such argument be tenable. Indeed, even the Court in *Korematsu* acknowledged, as the Court should again acknowledge in the present case, that "[o[ur task would be ***simple***, our duty ***clear, were this a case involving the imprisonment of a [person] because of racial prejudice.***" 323 U.S. at 203 (emphasis added). Of course, respondent alleges that this is just such a case.

Fred Korematsu passed away not long ago, but in the year before he died he addressed this Court, and some of the underlying historical facts and issues raised by respondent's pleadings in this case, as a "friend of the Court" in *Rasul v. Bush*, 542 U.S. 466 (2004). *See* Brief of *Amicus Curiae* Fred Korematsu in Support of Petitioners (January 14, 2004). Mr. Korematsu's case, as well as his amicus brief and his impassioned pleas to this Court in that case --- urging the Court to view the Government's response to the September 11 attacks in light of the well-documented history of unnecessary restrictions placed on the civil liberties of immigrants and minorities in the United States during times of national crisis – should echo and reverberate loudly here.

Indeed, like the facts laid bare in the OIG's investigation and report, the facts of *Korematsu* and some of the lasting principles of liberty and equality articulated there speak out just as loudly today as they did 60 years ago against "racial antagonism" and in favor of the need to review with "the most rigid scrutiny" "all legal restrictions which curtail the civil rights of a single racial group." *Korematsu,* 323 U.S. at 216. And, like Judge Patel's cautionary words in granting Mr. Korematsu's *coram nobis* petition, the facts and this Court's decision in *Korematsu* still stand before this Court:

> [a]. . . as a constant caution that ***in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees***. . . . [b] as a caution that ***in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability***. . . . [and,] [c] as a [further] caution that ***in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens [and persons] from the petty fears and prejudices that are so easily aroused***.

Korematsu, 584 F. Supp. at 1420 (emphasis added).

B. The Substantial Public Record of Petitioners' Knowledge and Involvement in the Unconstitutionally Discriminatory Detention and Mistreatment of Muslim and/or Arab Men Like Respondent Provides Further Context and Plausibility to Respondent's Claims

Respondent's claims against petitioners, and petitioners' claims of immunity, must also be viewed in the context of the substantial public record that has now been created regarding the Government's detention and mistreatment of Muslim and/or Arab men considered "of high interest" to the massive federal investigation launched by petitioners after the September 11 attacks. This substantial historical record, including but not limited to the OIG's reports, supports the respondent's claims against petitioners and shows that they are indeed entirely plausible.

As the District Court found below, the April 2003 OIG Report and "the post-September 11 context provide[] support for [respondent's] assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process." App. 116a. In fact, as the District Court explained, "[t]he April 2003 OIG report . . . suggests the involvement of Ashcroft, the FBI Defendants, and the BOP Defendants in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities." *Id.* 116a-117a (citing the April 2003 OIG Report, pp. 37-39, 42, 49,

60, 69-71, 112-13, 116). Subsequent OIG reports lend additional factual support to respondent's claims in this regard. *See e.g.,* the OIG Supplemental Report, and the OIG's July 17, 2003 Report to Congress.

For example, each of these OIG reports examines and evaluates the treatment of alien detainees like respondent held on immigration charges (not consistently enforced before September 11) in connection with the Government's investigation into the September 11 attacks. Supplemental OIG Report at 1. Each report focuses on exactly how "the Department of Justice," headed at the time by petitioner Ashcroft, "handled these detainees, including their processing, their bond decisions, the timing of their removal from the United States or their release from custody, their access to counsel, and their conditions of confinement." *Id.* Each concludes, while recognizing the serious difficulties and challenges the DOJ faced responding to the attacks, that there were "significant problems in the way the Department handled the September 11 detainees." *Id.* at 13; *see also* April 2003 OIG Report at 195.

In addition, each of the OIG's reports, including but not limited to the OIG's July 17, 2003 Report to Congress, finds unequivocally, among other things, that there is evidence of "a pattern of physical and verbal abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks and during intake and movement of prisoners." July 2003 Report to Congress at 14. Lending further

support and plausibility to respondent's specific claims against the petitioners, these OIG reports tie this mistreatment and abuse to the emotionally charged and angry atmosphere at the MDC immediately after the September 11 attacks, and to "the vague label attached to the detainees" by the petitioners as "of high interest." Supplemental OIG Report at 4. As the OIG explains, "based on the vague label attached to the detainees by the FBI, the MDC staff initially was lead to believe that the detainees could be terrorists or that they may have played a role in the September 11 attacks." *Id.* Importantly, the OIG has also concluded

> [T]he Department used federal immigration laws to detain aliens in the United States who were suspected of having ties to the September 11 attacks or connections to terrorism, or who were encountered during the course of the terrorism investigation conducted by the [FBI]. In the first 11 months after the attacks, 762 aliens were detained in connection with the FBI terrorism investigation for various immigration offenses, including overstaying their visas and entering the country illegally.
>
> A total of 84 of these aliens were confined at the MDC on immigration charges in the 11 months after the attacks. The facility at which a September 11 detainee was confined was determined mainly by the FBI's assessment of the detainee's potential links to the September 11 investigation or ties to terrorism. The FBI assessed detainees as 'high

> interest,' 'of interest,' or 'undetermined interest.' Generally, those labeled of 'high interest' were confined at the MDC.

Supplemental OIG Report at 2.

Notwithstanding these and other finding by the OIG, and notwithstanding "factually suggestive" allegations in respondent's pleadings "from which a reasonable inference of illegal conduct may be drawn" (Petitioner's Brief at 24), petitioners suggest that, given their high-ranking positions within the Government at the time, it is not plausible to believe that they would have been "personally involved in any discriminatory decision, or that they personally acted with any invidious discriminatory purpose toward respondent." Petitioners' Brief at 31. Petitioners similarly ask this Court to find, before they have been subjected to any discovery whatsoever, that the Second Circuit was somehow wrong to conclude that there is a "likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." App. 62a.

When the allegations of respondent's pleadings are viewed in their proper historical context, however, both common sense and the findings of the OIG support the Second Circuit's conclusions in this regard and counsel against accepting petitioners' arguments. Indeed, the OIG's reports, as the District Court found, support

respondent's assertions that petitioners were in fact intimately involved, at the highest levels of the Government's post-September 11 investigation, "in creating and/or implementing the detention policy under which [respondent and other Muslim and/or Arab men considered 'of high interest'] were confined without due process." App. 116a.

C. The Second Circuit's Decision is Consistent With This Court's Longstanding Refusal to Allow the Attorney General and Other Executive Branch Officials to Carry Out Their National Security Functions Wholly Free from Concerns for Personal Liability

Even in times of heightened national security, this Court has previously held that the Attorney General and other Executive Branch officials are not absolutely immune from either scrutiny or a *Bivens* suit for damages – and from the threats, inconveniences and costs of litigation in cases like this one – for their clear violations of the Constitution and Congressional enactments. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). In fact, this issue was squarely addressed and put to bed in *Mitchell*.

There, applying the "new" objective standards of qualified immunity set forth three years earlier in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court compared the functions of the Attorney General acting in times of asserted "national security" with those of the President, legislators, judges, prosecutors, and one or two others for whom an absolute immunity from suit has been found

appropriate. In the end, however, the Court in *Mitchell* found, in a case where "[d]iscovery and other preliminary proceedings had dragged on for . . . five-and-a-half years" (*Mitchell*, 472 U.S. at 515), that "the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions." *Id.* at 520. Neither the FBI Director nor any of the other petitioners, all holding Executive Branch positions of similar or lesser rank and function than petitioner Ashcroft, stand on any different ground.

In *Mitchell*, again following *Harlow's* holding that qualified, not absolute immunity, is generally the only shield for the Attorney General and other members of the Executive Branch, the Court was careful to "emphasize that the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints." *Id.* at 524. Instead, "[u]nder the standard of qualified immunity articulated in *Harlow* . . . , the Attorney General will be entitled to immunity [only] so long as his actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mitchell*, 472 U.S. at 524 (citing *Harlow*). As further explained by Justice White in *Mitchell*:

> [T]he Attorney General will be entitled to immunity so long as his actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' . . . This standard will not allow the Attorney General to carry out his

> national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: 'Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . . . This is as true in matters of national security as in other fields of governmental action. We do not believe the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

Id. (emphasis in original)(internal citations omitted).

In this case, whether or not the Attorney General paused when carrying out his national security functions in the wake of the September 11 attacks to consider whether or not the allegedly discriminatory detention and mistreatment of respondent and other Muslim and/or Arab men in the ADMAX SHU could be squared with the Constitution and laws of the United States is a matter as yet undiscovered. Petitioners nevertheless seek a decision from this Court, in the guise of their request to find that respondent's initial pleadings fail to state a claim, effectively providing them with what the Court in *Mitchell* refused to give: namely, absolute immunity from suit and from any and all

discovery on this and other issues related to their defense of immunity. Indeed, petitioners' arguments before this Court, though not expressly couched in the language of absolute immunity, would bring about the same result. That is because petitioners seek a ruling from this Court, contrary to the rulings below, that precludes the conduct of even limited discovery related to their immunity defenses based solely on the initial pleadings. The Court should deny this veiled attempt at obtaining a grant of absolute immunity for the petitioners' post-September 11 unconstitutional conduct in the name of "national security."

But Harlow made it clear, and *Mitchell* reinforced the rule, that dismissal of a *Bivens* suit like this one -- before any discovery at all is conducted – is only appropriate where it can be decided as a matter of law, pursuant to Rule 12(b)(6) or Rule 56, that the government official in question's "conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." 457 U.S. at 817. This is simply not that kind of case, as the District Court and Second Circuit found below, at least not with respect to respondent's claims of discrimination because of race, national origin, ethnicity, and religion.

Nor is this a case where the pleadings fail to state a colorable and plausible claim for relief against the petitioners. Only if it were, *Harlow* held, would pre-discovery dismissal be allowable at the pleading stage. But in a case like the present one, where the complaint adequately alleges the

commission of acts that violated clearly established law, "a plaintiff's claims of constitutional violation – even against a former Attorney General – must at least be allowed to continue to the discovery phase." *Mitchell, supra.* This is just such a case and the Second Circuit's well-balanced approach in allowing discovery to proceed as against the petitioners in a structured and limited manner that will preserve both respondent's and petitioners' rights to seek summary judgment on their immunity defense after discovery is completed are entirely consistent with this Court's precedents.

POINT II

GRANTING PETITIONERS' REQUEST FOR IMMUNITY FROM ALL DISCOVERY BASED SOLELY ON THE PLEADINGS WILL PLACE AN UNDUE BURDEN ON CIVIL RIGHTS PLAINTIFFS AND WILL SOUND THE DEATH KNELL TO THE PRINCIPLES UNDERLYING *BIVENS*

A. The Second Circuit Firmly and Properly Applied the Notice Pleading Requirements of the Federal Rules and this Court's Precedents

Both the Second Circuit and the District Court denied petitioners' respective motions to dismiss respondent's discrimination and conspiracy claims, *inter alia*, pursuant to Fed. R. Civ. P. 12(b)(6). Petitioners' motion was based on grounds of qualified immunity, a ground rejected by the Second Circuit and as to which *certiorari* was neither requested nor granted by the Court, and on respondent's purported failure to either state a non-conclusory claim upon which relief could be granted, or to allege any personal involvement on the part of petitioners Ashcroft and Mueller showing that they were responsible for respondent's discriminatory mistreatment and resulting damages.

In rejecting these asserted grounds for pre-answer and pre-discovery dismissal, and in finding that respondent is entitled to at least limited discovery from the petitioners on the claims made against them, the Second Circuit pointed to certain clear and specific allegations made by respondent in

his pleadings that "he was deemed to be 'of high interest,' and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion" and all of the defendants, petitioners included, "specifically targeted [him] for mistreatment because of his race, religion, and national origin. *Id.* Based on these and other specific allegations about the petitioners' alleged conduct in creating, authorizing, ratifying, endorsing, implementing and serving as the principal architects for the discriminatory policies challenged here, the Second Circuit correctly found, notwithstanding petitioners' arguments to the contrary, that the allegations set forth in respondent's pleadings "are sufficient to state a claim of animus-based discrimination that any 'reasonably competent officer' would understand to have been illegal under prior case law." *Id.* This was the right decision because the historical context of this case makes respondent's claims entirely plausible, if not likely.

The Second Circuit further held, correctly we submit, "that courts cannot require a heightened pleading standard for civil rights complaints involving improper motive" and that respondent's allegations of personal involvement by the petitioners – including but not limited to respondent's claims "that Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed to subject [respondent] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest" – "satisf[y] the plausibility standard without an allegation of

subsidiary facts" such as the petitioners would insist upon under *Bell Atlantic v. Twombly*, 127 S.Ct. 1955 (2007). App. 62a.

The court's decision in this regard was fully in accord with *Twombly* and with the "firm application" of the Federal Rules of Civil Procedure which petitioners' themselves urge the Court to follow here. *See, e.g.,* Petitioners' Brief at 15 (quoting *Butz v. Economou,* 438 U.S. 478, 508 (1978). By its express terms, Fed. R. Civ. P. 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The Second Circuit firmly applied this rule and refused petitioners' urgings to adopt what amounts to nothing less than a heightened pleading standard in civil rights and constitutional discrimination cases like this one. In so doing, the Second Circuit properly found that to grant petitioners' request would require an amendment of the Federal Rules of Civil Procedure by Congress. *See* App.25a-26a.

Petitioners now seek the same relief from this Court, even though the plain language of Rule 8(a) and this Court's precedents mandate the conclusion that no such heightened pleading standard may be imposed by judicial fiat or interpretation of rules that are clear on their face. Thus, in *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007), this Court held that a prisoner bringing a Section 1983 claim is not required to state "specific facts" in his complaint. All that is required under Rule 8(a)'s simplified "notice" pleading standard, *Erickson* held, is that the complaint "give the defendant fair notice of what the

. . . claim is and the grounds upon which it rests." *Id.* (citing *Bell Atlantic*, 127 S.Ct. at 1964).

This clear reading of Rule 8(a) and of *Bell Atlantic* notwithstanding, petitioners demand a new interpretative rule from the Court in this case – applicable only in civil rights cases brought under *Bivens* against high-ranking government officials for the violation of clearly established constitutional rights – requiring plaintiffs like respondent to specify in their complaints exactly which steps were taken when, by whom, and where, and when, by whom, and where any approval, condonement or ratification of any of the actions were taken). Petition for a Writ of Certiorari at 17. Never before has such a fact-specific and defense-specific pleading standard been required by the Court of any other civil rights plaintiffs, and the Court should reject this approach altogether.

Furthermore, the petitioners' reading of *Twombly* is entirely at odds with every Circuit Court but the Ninth in refusing to read *Twombly* as requiring a heightened pleading standard, or requiring that specific facts be pleaded unless required by Fed. R. Civ. P. 9(b). *See, e.g., Thomas v. Rhode Island*, No. 07-1985, 3 2008 WL 4335102, *3 (1st Cir. 2008); *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008); *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008); *Giarratano v. Johnson*, 521 F.3d 298, 304 n. 4 (4th Cir. 2008) ("[In *Erickson*] the Supreme Court, citing *Twombly*, reiterated that Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to

relief.."); *In re Katrina Canal Breach Litigation*, 495 F.3d 191, 205 n. 10 (5th Cir. 2007); *United States v. Ford Motor, Co.*, 532 F.3d 496, 503 n.6 (6th Cir. 2008); *Limestone Development Corp. v Village of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) ("*Bell Atlantic* must not be overread."); *Gregory v. Dillards, Inc.*, 494 F.3d 694 (8th Cir. 2007); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008); *Davis v. Coca-Cola*, 516 F.3d 955, 974 n. 43 (11th Cir. 2008); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007); *Aktieselskabet v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) ("*Twombly* leaves the long-standing fundamentals of notice pleading intact").

Petitioners' position here conflicts with all of these decisions and goes beyond even the Ninth Circuit's over-expansive reading of *Twombly*. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 n.5 (9th Cir. 2008). Either way, the heightened pleading standard advanced by petitioners and by the Ninth Circuit in *Kendall* finds no support in either the text of Rule 8(a), its legislative history, or the decisions of this Court both before and after *Twombly*.

B. A Heightened Pleading Standard Would Unduly Burden Civil Rights Plaintiffs

Amici are deeply concerned that if the Second Circuit's well-balanced and reasoned decision is not upheld, and if the heightened pleading standard urged by petitioners is adopted by the Court in cases of this kind, the result will be to effectively foreclose judicial recourse to plaintiffs, like respondent, who have been injured by the constitutional violations of

high-ranking government officials. However, the very same concerns which have compelled this Court to reject the imposition of heightened pleading requirements for civil rights plaintiffs in other contexts also obtain in this case.

For example, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168 (1993), the Court unanimously overruled the Fifth Circuit's imposition of a heightened pleading standard for § 1983 plaintiffs on two grounds. The first was that qualified immunity did not work a governmental immunity from suit. *Id.* at 166-67. The second was that a judicially imposed pleading standard would encroach upon Congress' exclusive authority to do so through amendment to the Federal Rules. *Id.* at 168. Similarly, in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), this Court overruled an earlier attempt by the Second Circuit to impose a heightened pleading standard on employment discrimination plaintiffs which would have required they plead a *prima facie* case. 534 U.S. 506, 510 (2002). In rejecting such an approach in *Swierkiewicz,* the Court noted that discovery rules were designed to unearth the facts needed to meet this standard and that imposition of a higher standard at the pleading stage would work to foreclose colorable employment discrimination claims. *Id.* at 512. Further, the Court reoriented the Circuit Courts around Rule 8(e)(1)'s "simplified notice pleading" regime and reiterated, citing *Leatherman,* that amendment of the Federal Rules is the exclusive province of Congress. *Id.* at 514-15.

The petitioners' reading of *Twombly* conveniently ignores the well-grounded bases for these precedents in an attempt to create a further barrier to suit at the pleading stage in any case where a civil rights plaintiff seeks to hold high-level Government officials accountable for unconstitutional actions taken in the name of national security. Indeed, petitioner's reading of *Twombly* would impose upon respondent and other civil rights plaintiffs the impossible task of pleading a *prima facie* case prior to discovery, however, in a situation where the petitioners hold all the cards and are in possession of all evidence regarding their objective motivations and knowledge at the time in question.

Obviously, to adopt petitioners' suggested approach would greatly inhibit the access of civil rights litigants to the federal courts and thus limit a critical tool for combating racial injustice. *See* Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L. J. 85, 107 (1994) (articulating the primacy of civil rights litigation in the struggle for equality). See also Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 300-01 (1989) (observing that a heightened standard would disproportionately impact civil right litigants by requiring specificity in their pleadings when they lack the financial resources to do so). For these reasons as well the Court should reject petitioners' proposed heightened standard of pleading.

C. The Principles *Bivens* Was Based Upon Remain Valid and Must Be Preserved

In *Bivens*, this Court held that the petitioner, having been subjected to what he alleged was a grossly unreasonable search, seizure, and arrest accompanied by unreasonable force in violation of the Fourth Amendment, stated a cause of action and was entitled to pursue his claims for money damages in federal district court for any injuries he suffered at the hands of federal narcotics agents. 403 U.S. at 397. The Court in *Bivens* thus confirmed, among other things, that the teachings of *Marbury v. Madison*, 1 Cranch 137, 163 (1803) are still valid. In *Marbury*, the Court held, as Justice Brennan explained again in *Bivens*, that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397 (quoting Justice Brennan *Marbury*, 1 Cranch at 163).

Both *Bivens* and *Marbury*, thus stand as shining examples of the fact that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens, supra*. (internal citations omitted). The Court in *Bivens* similarly affirmed the "well settled" rule announced by this Court in *Bell v. Hood*, 327 U.S. 678 (1946), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396.

Before this Court, petitioners and their *amici* seek to extinguish respondent's well-pled constitutional discrimination claims under *Bivens* and Section 1985(3) because "[t]hey believe that the qualified immunity doctrine provides important legal protections to federal government officials." Amicus Brief of Five Former Attorneys General, 2008 WL 4154531, *1. More candidly, they are concerned, given the Second Court's affirmance and direction that petitioners submit to certain limited discovery related to their defense and respondent's claims, that they "will be unable to win pre-discovery dismissal" of what they characterize as "insubstantial constitutional claims." *Id.*

But the question here before the Court is not whether the respondent's constitutional claims are insubstantial. Rather, the question here is little or no different than it was in *Bivens*. Here, as there, the question most simply put "is merely whether [respondent], if he can demonstrate an injury consequent upon the violation of federal agents of his [constitutional] rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Id.* Given the detailed allegations of respondent's complaint, the liberal pleading standards of the Federal Rules, and this Court's precedents, this is a question that can be answered only one way (*i.e.*, in the affirmative) if *Marbury* and its teachings indeed remain alive.

In the name of "national security," however, petitioners would have this Court effectively overrule *Bivens* and the bedrock principles on which

it stands through the artifice of a thinly veiled heightened pleading standard that neither the Federal Rules nor this Court's precedents will allow. The Court should not create such a pleading bar to "the ordinary remedy for an invasion of personal liberty" just because the petitioners are current and/or former high-ranking governmental officials.

To do as the petitioners have requested will have disastrous consequences for citizens and aliens alike, for it will sound the inevitable death knell to the rights of all persons in the United States to seek redress for constitutional violations suffered at the hands of responsible Government officials, including high-level officials like the petitioners. Particularly in a case like the present one, where the respondent's constitutional claims of discrimination are well supported and entirely plausible, this Court should not countenance such a result.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN E. HIGGINS
NIXON PEABODY LLP
677 BROADWAY
Albany, New York 12207
(518) 427-2704
Counsel for Amici Curiae

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APPENDIX

APPENDIX

Amicus Curiae Japanese American Citizens League (JACL) is the nation's oldest and largest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. Founded in 1929, JACL was organized as an educational/social action group in response to prejudice and discrimination directed toward Americans of Japanese ancestry. JACL's mission is to secure and uphold the human and civil rights of Americans of Japanese ancestry and others and to promote and preserve the cultural heritage and values of Japanese Americans. Over the years, JACL has helped to overturn, repeal, or amend more than 600 discriminatory laws and statutes, including but not limited to the Cable Act of 1922, the Emergency Detention Act of 1950, and the Immigration and Nationality Act of 1952. A founding member of the Leadership Conference on Civil Rights, the largest civil rights coalition in the United States, JACL assisted in repealing Idaho's anti-miscegenation law in 1959, joined in the "March on Washington" in 1963 with Dr. Martin Luther King to demonstrate its commitment to insuring complete civil rights for all Americans, and in 1944, JACL filed an amicus legal brief in *Korematsu v. United States*, 323 U.S. 214 (1944) in support of the Petitioner. In 1978-81, JACL was instrumental in persuading Congress to establish the Commission on Wartime Relocation and Internment of Civilians, which made findings and recommendations on the wartime incarceration of Japanese Americans. JACL also took a leading role in advocating for

passage of the Civil Liberties Act of 1988, which provided an apology and $20,000 in compensation to then-living individuals who were interned or had their rights abridged during World War II.

Amicus Curiae Sikh American Legal Defense and Education Fund (SALDEF) is the oldest and largest Sikh American civil rights and advocacy organization in the United States. SALDEF's mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations through legal assistance, legislative and media advocacy, and educational outreach. Founded in 1996, and originally named the Sikh Mediawatch and Resource Task Force (SMART), SALDEF has provided free legal assistance to Sikhs in the United States since 1997. SALDEF was the first Sikh American organization to create a training program for first responders in July 1999; SALDEF's Law Enforcement Partnership Program has now trained over 35,000 individuals, including the FBI, DOJ, White House officials, and other public agencies, at the federal, state and local level and has collaborated with federal agencies to produce Sikh American awareness posters. Following the attacks of September 11, SALDEF met with the Secretary of the U.S. Department of Transportation on the "appropriate and sensitive" handling of Sikh American passengers; and has participated in regular meetings with top government officials, including the FBI Director, Attorney General, Secretary for Department of Homeland Security, and Assistant Attorney General for Civil Rights in its

efforts to protect the civil rights and liberties and religious freedoms of Sikh Americans and others.

Amicus Curiae Pakistani American Public Affairs Committee (PAKPAC) is a non-profit, non-partisan organization dedicated to fostering greater political and civic engagement amongst Pakistani Americans. Since 1990, PAKPAC has worked tirelessly to preserve, protect and promote the ideals of civil liberties cherished by all Americans. In the aftermath of September 11th, PAKPAC has proactively worked to develop the education and training of both community members and law enforcement personnel in an effort to strengthen constitutional rights and protections.

Amicus Curiae National Korean American Service & Education Consortium (NAKASEC) was founded in 1994 as a consortium of local community centers throughout the United States focused on the civil rights and education of Korean Americans. NAKASEC's mission is to project a national progressive voice on major civil rights and immigrant rights issues and promote the full participation of Korean Americans in American society. Through its Civil Rights Advocacy Program, NAKASEC seeks to educate and engage the Korean American community and others on major civil rights issues regionally and nationally, monitoring legislation and policies, producing educational materials and collaborating in coalitions seeking to protect the civil rights of all Americans. NAKASEC's community outreach efforts have helped Korean Americans develop awareness about civil rights issues, many for the first time.

Amicus Curiae Muslim Advocates is a non-profit organization created in 2005 as a sister entity to the National Association of Muslim Lawyers (NAML), a professional association of approximately 500 Muslim lawyers, law students and other legal professionals. Muslim Advocates is committed to a world in which equality, liberty, and justice are guaranteed for all, regardless of faith, and in which the Muslim American legal community is vital to promoting and protecting these values. In pursuit of this vision, Muslim Advocates' mission is to promote equality, liberty, and justice for all by providing leadership through legal advocacy, policy engagement, and civic education, and by serving as a legal resource to promote the full and meaningful participation of Muslims in American public life.

AMICUS CURIAE BRIEF

No. 07-1015

OCT. 31, 2008

In The Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CRISTÓBAL JOSHUA ALEX
MARIANNE ENGELMAN LADO
NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS
151 West 30th Street, 11th Floor
New York, NY 10001
(212) 244-4664

HAROLD HONGJU KOH
(*Counsel of Record*)
HOPE R. METCALF
ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC – NATIONAL LITIGATION PROJECT
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06510
(203) 432-1660
Counsel for Amici

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae comprise a group of civil rights and human rights organizations from around the Nation, including those that represent or advocate on behalf of people whose constitutional rights have been violated by public and private actors. Despite their diverse views and work, *Amici* have joined together to urge the Court to consider the broader impact this decision might have on civil rights litigation generally. *Amici* urge the Court not to limit the ability of individual plaintiffs to assert their civil rights in litigation against the officials ultimately responsible for setting unconstitutional policies or condoning unconstitutional acts.[2]

SUMMARY OF ARGUMENT

The Supreme Court should affirm the decision of the Second Circuit and reject Petitioners' position that a heightened pleading standard applies in situations in which plaintiffs seek to hold accountable "high-ranking" officials. The Second Circuit properly applied the holding of *Bell Atlantic v. Twombly*, 127

[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* are listed in the Appendix to this brief.

S.Ct. 1955 (2007), to require that pleadings meet a "plausibility" standard. Only once that plausibility standard had been met should a court allow "carefully limited and tightly controlled discovery by the Plaintiff as to certain officials." *Iqbal v. Hasty*, 490 F.3d 143, 178 (2d Cir. 2007).

The standard articulated by the Second Circuit properly balances the interests of plaintiffs and government defendants in civil rights cases. Certainly, there is a public interest in efficient government, and government officials deserve protection from needless discovery and suit. Yet the very reason supervisory officials are more vulnerable to suit – namely, that their decisions have a far greater impact than frontline officers – also indicates a stronger public interest in holding them accountable in those instances in which they engage in unconstitutional behavior. The "plausibility" standard for construing *Bell Atlantic* employed by the Second Circuit provides effective guidance in balancing these two public interests – for efficient government on one hand and the rule of law on the other.

By contrast, the standard proposed by Petitioners would overprotect defendants while undervaluing the constitutional rights of plaintiffs and degrading the rule of law. Petitioners' position would effectively impose higher factual requirements on plaintiffs in qualified immunity cases through judicial action rather than by amendment of the Federal Rules, something this Court has specifically cautioned against. By seeking to take away the district courts'

ability to prescribe even "phased" or "limited" discovery, *see* Pet'r Br. at 24-25, Petitioners' recommended interpretation of *Bell Atlantic* would require many civil rights plaintiffs to plead the very facts that they could not learn until the discovery phase. Perpetrators of civil rights violations rarely articulate their motives to their victims. This is particularly true in the instance of supervisory officials who set unconstitutional policies or who condone their inferiors' violations. Such policies are typically kept far from public view and behind a veil of silence. It is precisely in those cases that the public interest in judicial scrutiny is the strongest, to vindicate individual rights and to preserve the rule of law. And those interests do not wane in times of national emergency.

The adoption of Petitioners' position would have wide-reaching ramifications far beyond the "war on terror." As the cases described below illustrate, many worthy civil rights plaintiffs must rely on the discovery process to uncover concrete evidence that the defendant directed their mistreatment with an unconstitutional motive or deliberate indifference. Under the Second Circuit's standard in *Bell Atlantic*, once plaintiffs have afforded defendants full notice of plausible allegations against them, plaintiffs would have access to carefully limited judicially controlled discovery to substantiate their allegations of unconstitutionally motivated mistreatment. Under Petitioners' proposed standard, by contrast, many plaintiffs whose constitutional rights have been violated by biased or unlawful police investigations,

police brutality or race or sex discrimination would be bluntly denied both discovery and redress. The plaintiffs profiled in this brief represent only some of the wide range of civil rights victims who would be denied justice under the artificially high pleading standard proposed by the Petitioners.

ARGUMENT

Javaid Iqbal was one of hundreds of Arab, Muslim, and South Asian immigrants in the New York area arrested because of their ethnicity and religion in an arbitrary and heavy handed dragnet after the September 11, 2001 terrorist attacks. Neither Mr. Iqbal, nor any of the other men arrested in this dragnet were ever convicted of any crime relating to terrorism, nor has the government presented any evidence that any of the men posed a threat to national security. Nina Bernstein, *Held in 9/11 Net, Muslims Return to Accuse U.S.*, N.Y. TIMES, Jan. 23, 2006 at 1. Yet, like Mr. Iqbal, many of these immigrants suffered horrific abuse during their detention. The verbal, physical and sexual abuses suffered by Mr. Iqbal were not isolated incidents, but rather part of a pattern of government abuses against Muslims following the attacks of September 11. A report by the Office of the Inspector General observed that the pattern of abuse was likely not the product of coincidence, but rather a policy authorized at the highest levels of the federal government. Resp't Br. at 4-5.

By adopting a "plausibility" standard, the Second Circuit struck the right balance between Iqbal's litigation interests and protecting Defendants from improper liability and vexatious, needless discovery. In his complaint, Mr. Iqbal alleged that Petitioners, former Attorney General John D. Ashcroft and current Director of the Federal Bureau of Investigation ("FBI") Robert Mueller crafted, approved, and directed, "as a matter of policy" that detainees would be confined in the ADMAX SHU solely because of membership in protected classes. Pet'r App. 172a-173a (Compl. ¶ 96-97). Yet despite those straight-forward pleadings, the OIG Report's concrete conclusions and the Second Circuit's carefully staged discovery plan, Petitioners argue that the Second Circuit's opinion was a "mistake . . . under the now-discredited 'no set of facts' pleading-standard regime." Pet'r Br. at 26. Petitioners do not refer to their interpretation of *Bell Atlantic* as a "heightened" pleading standard, and admit that this Court rejected the notion that *Bell Atlantic* imposed a "heightened" standard. *See* Pet'r Br. at 25 (quoting *Bell Atlantic*, 127 S.Ct. at 1973 n. 14). But Petitioners' proposed rule would impose an impossible "Catch-22" on civil rights plaintiffs, by demanding that they plead what they could not yet know. As demonstrated below, were this Court to accept Petitioners' position, civil rights plaintiffs would be required to plead in advance specific facts regarding the actions of government officials that they could only reasonably learn upon later discovery. By putting the cart before the horse, such a rule

disrupts the proper balance between plaintiffs' and defendants' rights and offends the rule of law.

I. The Second Circuit Opinion Properly Interpreted Precedent, Respected the Discretion of District Courts, and Fairly Balanced the Constitutional Rights of Plaintiffs with the Immunity Interests of Government Officials.

The Second Circuit articulated an accurate, straightforward and fair interpretation of *Bell Atlantic v. Twombly,* 127 S.Ct. 1955 (2007) that reconciled that case's holding with *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) and *Crawford-El v. Britton*, 523 U.S. 574 (1998). As the Second Circuit noted, "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*." *Iqbal*, 490 F.3d at 155. After careful consideration of the factors mentioned in *Bell Atlantic*, the Second Circuit held that the Supreme Court "is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Id.* at 157-58. The court rejected a "universal standard of heightened fact pleading" and embraced a "flexible plausibility standard," striking a fair balance between

plaintiffs' interests in remedying violations of their constitutional rights and protecting government officials from vexatious and frivolous lawsuits. *Iqbal*, 490 F.3d at 157.

In reaching that compromise, the Second Circuit recognized that district court judges are well suited to supervise limited discovery. The Supreme Court has long relied upon district courts to exercise their "discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El*, 523 U.S. at 597-98. In doing so, "the Court in *Crawford-El* was careful to distinguish between the D.C. Circuit's solution to protect government officials from insubstantial claims, which it rejected, and the options otherwise available under the Federal Rules of Civil Procedure for federal trial judges to deal with this concern." *Currier v. Doran*, 242 F.3d 905, 915 (10th Cir. 2001); *see also Rippy v. Hattaway*, 270 F.3d 416, 426-27 (6th Cir. 2001) (Gilman, J., concurring) (distinguishing between "circuit-created" rules of heightened pleading and the options available to district courts to "weed out unmeritorious claims" pursuant to the Federal Rules of Civil Procedure); *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 944 (7th Cir. 1995) (internal citations omitted) ("[C]ontrolling the pace and scope of discovery, being a matter of case management rather than of the application of hard and fast rules, is also within the district judge's discretion."); *State of Ariz. v. Manypenny*, 672 F.2d 761 (9th Cir. 1982) (Kennedy, J.) ("The firing point of

the legal system is with the trial judge who is best situated to administer the law and protect the rights of all.").

In accordance with those principles, the Second Circuit upheld Judge Gleeson's authorization of "carefully limited and tightly controlled discovery by the Plaintiff as to certain officials." *Iqbal*, 490 F.3d at 178. Such structured discovery vindicates the purpose of qualified immunity and is well within the traditional competencies of district court judges. *Id.* The Second Circuit recognized that victims of constitutional violations often face serious and perhaps insurmountable challenges in pleading detailed, fact specific allegations in the absence of information controlled by the very government officials accused of constitutional violations. "[D]iscovery by the Plaintiff as to certain officials will be appropriate to probe such matters at the Defendants' personal involvement in several of the alleged deprivations of rights." *Id.* at 178. Imposing a heightened pleading standard in such situations would pose unjustified obstacles to uncovering evidence of discrimination in an opaque bureaucracy.

Petitioners propose replacing the Second Circuit's deference to a district court's traditional case management powers with a new rule that would strip away many of those powers. Petitioners begin by citing *Bell Atlantic*'s disavowal of the "no set of facts" standard in favor of a "plausible liability" standard. *See* Pet'r Br. at 23. To satisfy this new standard, according to Petitioners, plaintiffs must

plead "sufficient 'factual matter' to 'raise a right to relief above the speculative level' and to 'raise a reasonable expectation that discovery will reveal evidence of' illegal activity." *Id.* (citing *Bell Atlantic*, 127 S.Ct. at 1965). However, while seeking to impose a new requirement for "factual matter" and "factually suggestive" allegations, the Petitioners also seek to revoke the ability of district courts to engage in "careful case management" and "'phased' or 'limited' discovery." Pet'r Br. at 24-25.

Moreover, Petitioners' attempt to alter the pleading standard via the courts rather than through changes to the Federal Rules goes completely against this Court's own precedents regarding rule-making authority. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'") (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)). Petitioners themselves note that in *Bell Atlantic* this court explicitly rejected the notion that the pleading standard was being changed and acknowledged that it could be changed only by amending the Federal Rules. *See* Pet'r Br. at 25 (citing *Bell Atlantic*, 127 S.Ct. at 1973 n. 14). Yet while Petitioners may take pains to avoid characterizing it as such, their position on the impact of *Bell Atlantic* represents a radical change to pleading standards and to the conduct of litigation in federal courts.

The Petitioners' proposed pleading standard would create a "Catch-22" for civil rights and human rights plaintiffs: they would be required to plead specific facts that they could not possibly know without discovery in order to be allowed to proceed with discovery. Allowing phased discovery avoids this injustice, which is why the Second Circuit's interpretation of *Bell Atlantic* is correct.[3] Were this Court to

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[3] A number of other circuits have adopted a post-*Bell Atlantic* approach to discovery that is very similar to the Second Circuit's approach in this case. Like the Second Circuit, these other circuits interpret *Bell Atlantic*'s requirement that "factual allegations must be enough to raise a right to relief above the speculative level," *Bell Atlantic*, 127 S.Ct. at 1965, to mean that a complaint must create a reasonable expectation that discovery would reveal additional evidence. For example, in *Watts v. Fla. Int'l. Univ.*, the Eleventh Circuit said, "[t]he Court has instructed us that [*Bell Atlantic*] 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary element. . . . It is sufficient if the complaint succeeds in 'identifying facts that are suggestive enough to render the element plausible.'" *Watts v. Fla. Int'l. Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007) (quoting *Bell Atlantic*, 127 S.Ct. at 1965); *see also Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3rd Cir. 2008) ("The Supreme Court's *Twombly* formulation of the pleading standard . . . does not 'impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element") (citing *Bell Atlantic*, 127 S.Ct. at 1965); *Lindsay v. Yates*, 498 F.3d 434, 440 (6th Cir. 2007) (citing *Bell Atlantic*'s requirement of a "reasonably founded hope that the discovery process will reveal relevant evidence" to reverse dismissal of claim); *Khorrami v. Rolince*, 539 F.3d 782, 788 (7th Cir. 2008) (". . . nothing in [*Bell Atlantic*] suggests that Khorrami's

(Continued on following page)

adopt Petitioners' interpretation, then only in the rarest of cases where a "smoking gun" was already a publicly-known fact would a plaintiff have any possibility of surviving the pleading standard. *See, e.g.*, *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004) (rejecting dismissal on qualified immunity grounds in a case where wrongdoing had been previously established by a Congressional investigation). A misbehaving supervisory official could play a "head's I win, tail's you lose game" by concealing his wrongdoing, then avoiding discovery into it by invoking Petitioners' higher pleading standard. This Court should not accept Petitioners' invitation to create unnecessary and unjust obstacles to civil rights plaintiffs.

II. Neither National Security Nor "High-Ranking Officials" Justify Special Pleading Rules.

Invoking our national tragedy, Petitioners argue that civil rights complaints against "high-ranking" officials should face a heightened standard of pleading. Yet there is simply no principled distinction to be made among supervisory officials without sacrificing core democratic principles. *Butz v. Economou*, 438 U.S. 478, 506 (1978) (internal citations omitted) ("No

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complaint is inadequate. . . . Khorrami's allegations about Rolince's knowledge are plausible, and only discovery will show whether they are correct. Whether Rolince in fact was aware, unaware, or reckless has yet to be shown, but those facts need not be pleaded in the complaint.").

man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity."). Moreover, civil actions brought pursuant to Title 42 U.S.C. § 1983 and its judge-made cousin, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), represent an important mechanism through which constitutional norms are elaborated and enforced. *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 485 (1994) ("[T]he purpose of *Bivens* is to deter the [federal] officer from infringing individuals' constitutional rights."). By shielding supervisory officials from suit, Petitioners' rule would significantly undermine the necessary deterrent effect of civil rights suits and the rule of law.

Petitioners fail to adequately address the question of *when* their proposed heightened pleading standard would apply. Petitioners repeatedly cite the "national-security crisis" faced by this Nation and imply that government officials responding to this crisis should be protected from accountability for their constitutional violations by a heightened pleading standard.[4] Petitioners seem to imply that during national security crises, constitutional protections should be weakened by the imposition of a heightened pleading standard upon civil rights complaints. Yet as observed by the Second Circuit, "the exigent

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[4] The phrase "national security" appears ten times in Petitioners' brief, at 10, 11, 13, 18, 19, 26, 33, 40, and 41.

circumstances of the post-9/11 context do not diminish the Plaintiff's right not to be needlessly harassed and mistreated by repeated strip and body-cavity searches." *Iqbal*, 490 F.3d at 150-60. Moreover, the Petitioners do not explain when such a heightened pleading standard would be triggered.

Petitioners fail to articulate limiting principles because there is no clear limit to the exceptions they would create. There cannot be one special pleading standard applied to "high" government officials during "extraordinary" times and another applied to "low" government officials during "ordinary" times. Such exceptions would swallow the rule. As the Court has recently held, "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times." *Boumediene v. Bush,* 128 S.Ct. 2229, 2277 (2008).

The roundup of Mr. Iqbal and other Muslims following the September 11th attacks is but the latest episode during the history of this great Nation when government officials have persecuted ethnic and religious minorities during periods of national crisis. In the past the Court has not always protected weak and unpopular groups from the unconstitutional and capricious exercise of power by government officials citing the imperatives of national security. *See Korematsu v. United States*, 323 U.S. 214 (1944). Yet, as the Court has recently observed, "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled

within the framework of the law." *Boumediene,* 128 S.Ct. at 2277.

Amici respectfully ask the Court to protect the People's liberty and security within the framework of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 2 recognizes "one form of action known as the civil action." Fed. R. Civ. P. 2. Federal Rule 8 specifies a notice pleading standard for all civil cases, without exception for those involving claims of national security. Fed. R. Civ. P. 8. The Second Circuit's "plausibility" standard adequately balances national security interests within a procedural framework that holds even the powerful accountable for violations of the Constitution.

III. Petitioners' Heightened Pleading Standard Would Adversely Affect a Broad Class of Civil Rights Plaintiffs.

Although Mr. Iqbal's claims arose under extraordinary circumstances, there is nothing unique about the violations he suffered or his need for judicial recourse. Civil rights litigation has proven to be a necessary bulwark against the use of excessive force, abuse of process and retaliation by federal, state and local officials, especially in circumstances involving supervisory liability. The individuals profiled below are among the many plaintiffs whose claims would likely have been dismissed under a heightened pleading standard applied to civil rights actions in which officials assert the defense of qualified immunity.

Individuals like these would suffer were the Court to overprotect defendants in civil rights cases by adopting the Petitioners' heightened pleading standard.

A. Sara Reedy: Failure to Supervise Officers who Abuse their Authority

Sara Reedy's ordeal shows why structured discovery is necessary in claims against officials supervising police officers who abuse their authority. Reedy was nineteen years old and working the night shift as a cashier at a gas station when she was sodomized by a man holding a gun to her head. *Reedy v. Township of Cranberry*, 2007 WL 2318084 at *1 (W.D. Pa. 2007). After sexually assaulting her, her assailant ordered her at gunpoint to remove money from the gas station's safe and rip the phone lines from the wall. After her assailant left, Reedy fled the station and sought assistance. *Id.* at *1.

Unfortunately for Reedy, the police appeared less interested in apprehending her assailant than accusing her of the theft. After Reedy provided the police with information regarding the robbery and sexual assault, she was taken to the hospital where she was treated and evidence of the sexual assault was gathered. While Reedy was at the hospital, Officer Frank Evanson formed the opinion that Reedy had fabricated the story and stolen the money in order to support a heroin habit. While Reedy was still receiving treatment in the hospital, Evanson accused her of faking the sexual assault and committing the theft

herself. Without a warrant or informed consent, Evanson ordered a toxicology screen of Reedy's blood. *Id.* at *1-2.

When Reedy gave a detailed statement to the police a few days later, she included a description of Evanson's inappropriate behavior at the hospital. After Reedy gave her statement, Officers Evanson and Meyer visited Reedy at her home and attempted to intimidate her into admitting she had fabricated the sexual assault and theft. The Officers threatened both Reedy and her husband. Reedy refused to recant, whereupon Evanson promised to return with a warrant for her arrest. *Id.* at *2.

Evanson obtained an arrest warrant against Reedy, charging that she had made a false report to law enforcement, committed theft by unlawful taking and had received stolen property. When Reedy, now four months pregnant, became aware of the warrant a few days later, she turned herself in. At her preliminary hearing, Evanson testified that Reedy was a flight risk, despite the fact that she had no serious criminal record, little money and was pregnant. After bond was set at $5,000, she served five days in jail while awaiting a bail reduction hearing. Her husband was forced to sell many of their possessions in an attempt to make bail. *Id.*

One month before Reedy's trial was to begin, Wilber Cyrus Brown was arrested while in the process of committing a robbery and attempting to sexually assault another convenience store clerk. The

suspect subsequently confessed to a series of sexual assaults, including the attack upon Reedy. Karen Kane, *Butler County's Tax Dollars Hard at Work*, PITTSBURGH POST-GAZETTE, 28 Feb. 2007 at 1; Karen Kane, *Assault Victims' Lawsuit to Delay Prosecution of Assailant*, PITTSBURGH POST-GAZETTE, 17 Aug. 2007 at 1. Although the charges against Reedy were then dropped, Reedy had already lost her job, was forced to drop out of school and been deeply traumatized by the police harassment and intimidation as well her incarceration. *Reedy*, 2007 WL 2318084 at *2 (quoting Compl. at ¶¶53-62).

Reedy brought an action under 42 U.S.C. § 1983 against Officers Evanson and Meyer, their supervisor Steve Mannell, and the District Attorney of Butler County, Pennsylvania, as well as Butler County itself alleging false imprisonment, unlawful detention, malicious prosecution and harm to her liberty interest in violation of the Fifth Amendment. *Id.* at *1. At least with respect to malicious prosecution, Reedy's claims were strong enough that Butler County reached a financial settlement with her outside of court. *Id.* at *1.

Evanson, Meyers and Mannell moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). Defendant Mannell asserted the defense of qualified immunity and alleged that Reedy had not pleaded sufficiently detailed facts to show his personal involvement in the violation of her constitutional rights. *Id.* at *5. In rejecting Mannell's motions to dismiss, District Judge Cercone highlighted the

problem of asymmetric information faced by civil rights plaintiffs like Sara Reedy. Judge Cercone found that Reedy had

> . . . a well-founded basis for the general allegations of the claim based on information and belief, *but is not capable of detailing specific allegations against the defendant because such information is exclusively within the possession and control or knowledge of the defendant.* If the plaintiff does not have access to such specific information about the defendant's behavior because discovery is the only avenue by which the plaintiff could learn about the defendant's specific undertakings, the plaintiff cannot be expected to allege anything more than what was in the original complaint.

Id. at *7 (emphasis added). Judge Cercone next emphasized the necessity of limited discovery in cases of qualified immunity. "Only some form of discovery could satisfactorily verify the veracity of Mannell's factual assertion . . . Thus, to foreclose a § 1983 claim on the defense without even so much as the ability to explore that distinct possibility would run the risk of elevating the defense to a level of protection far beyond its intended purpose." *Id.* at *8. In reaching the decision to allow limited discovery, Judge Cercone employed a plausibility standard: "It is reasonable to infer that detectives and officers often confer with and seek guidance and direction from their supervisors, particularly in challenging or high profile cases." *Id.* at *8.

Judge Cercone rejected Mannell's motion to dismiss on the basis of qualified immunity. In balancing Reedy's constitutional rights against the defense of qualified immunity, Judge Cercone permitted limited discovery against the defendant police officers with respect to their interactions with their superiors and allowed Reedy to amend her complaint on the basis of that discovery. Because Judge Cercone allowed limited and structured discovery, Reedy obtained the information necessary to amend her complaint to include specific factual allegations regarding Mannell's personal involvement in the violation of her constitutional rights. *Reedy v. Evanson*, Am. Complaint, Civ. No. 2:06-cv-01080-DSC (Mar. 12, 2008). In particular, she made detailed allegations that Mannell had personally consulted upon the investigation of her case and condoned the officers' conduct.

Sara Reedy's case illustrates that controlled discovery is essential to vindicating civil rights violations. Only with limited and structured discovery was Reedy able to determine what role Mannell played as policy maker and supervisor and the extent of his involvement in the violation of her constitutional rights. The Second Circuit's standard allows for the limited discovery which provided for Reedy's remedy. The Petitioners' standard would block such discovery. Had Petitioners' proposed heightened fact pleading standard been required to overcome Mannell's defense of qualified immunity, Sara Reedy would have

been deprived of the opportunity to pursue a remedy for the violation of her constitutional rights.

B. George Jones: Unconstitutional Policies and Practices in Criminal Investigations

George Jones was a senior at Fenger High School in Chicago approaching graduation in May 1981. Jones, the son of a local policeman and the editor of his school newspaper, planned to join the Air Force and then attend college. *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988).

Jones' dreams were shattered as the result of a terrible tragedy. Only one block from his house, 12-year-old Sheila Pointer was raped and beaten to death on May 4, 1981. The assailant also beat Sheila's 10-year-old brother Purvy unconscious. Detectives Houtsma and Tosello questioned Purvy just as he was emerging from a coma. Based upon equivocal and conflicting statements from Purvy, the police searched the neighborhood and settled upon George Jones, even though he did not match the description. *Id.* at 988. Detectives went to George's high school and arrested him in his classroom. They brought him to the police station and "threatened him with the electric chair if he didn't confess." *Id.* at 989. Despite the threats, Jones denied any involvement with the crime.

The following day, a grand jury indicted Jones for murder and rape based on a factual record riddled

with fabrications and omissions. *Id.* at 990. The official arrest report, signed by supervisor Sergeant Palmer, falsely stated that Jones' father told officers that he had not seen his son the morning of the murder and left out key information such as that Purvy had indicated that the assailant was a gang member and that he had failed to affirmatively identify Jones as the assailant.

After the indictment, a new detective on the case, Detective Laverty, uncovered new evidence. He interviewed Purvy, who for the first time said that there had been two assailants and that they had worn stocking masks and again said the assailant was a gang member. *Id.* Several months later, a well-known gang-member, "King George," confessed to a strikingly similar murder nearby. Detective Laverty told his supervisors, Commander Deas and Lieutenant Griffith, who was the head of the violent crimes unit of the area detective division, that the police had charged the wrong person. Laverty wrote in a report that he believed that "King George," not Jones, was the murderer, but his superiors never forwarded it to state prosecutors. Commander Deas later lied to Laverty that the charges had been dropped in light of the contradictory evidence. *Id.* at 990.

Subject to a police department policy of keeping "street files," all of the exculpatory evidence was excluded from the official file and remained hidden from prosecutors or defense counsel. The street files were essentially shadow files of the official investigatory files handed over to prosecutors and contained

informal notes and memos, whereas the official files contained only the final reports. As a result, the street files were not available to defense counsel even if they contained exculpatory material. For Jones, that meant that his lawyer had only Sergeant Palmer's official report – riddled with falsehoods and omissions – and his lawyer never learned the full accounts of the various conflicting witness statements or Detective Laverty's discoveries. *Id.* at 989.

In the spring of 1982, Detective Laverty was shocked to learn that George Jones was standing trial for the rape and murder of Sheila Pointer. Laverty contacted Jones' lawyer to tell him about the exculpatory information secreted in the "street files." The lawyer told the trial judge, who declared a mistrial. Shortly afterward the state's attorney dropped all charges against Jones. No apology was ever made to Jones, and neither the City nor the state offered to compensate him for his ordeal. *Id.* at 991.

Following the mistrial, Jones briefly attended a community college, but quit "amid harassment that included finding a piece of paper bearing the word 'murderer' taped to his locker." Fred Marc Biddle & Maurice Possley, *City Fined $800,000 in Arrest Suit*, CHI. TRIB., Mar. 6, 1987 at 1, *available at* 1987 WLNR 1399493. Jones continued to be plagued by ongoing post traumatic stress disorder and the recurring nightmare of being executed while his parents looked on. Having abandoned his early dreams of joining the Air Force and going to college, he ultimately moved to Detroit and worked as an exotic dancer. *Id.*

Jones sued the City of Chicago and several officers, including supervisors Commander Deas, Lieutenant Griffith, and Sergeant Palmer, under 42 U.S.C. § 1983 for false arrest, false imprisonment, intentional infliction of emotional distress, and malicious prosecution, as well as conspiracy to commit these wrongs. He alleged that the defendants' conduct had denied him due process of law under the Fourteenth Amendment and violated his rights under the common law of Illinois. A jury awarded him $801,000 in compensatory and punitive damages. *Id.* at 992.

In challenging the verdict on appeal, the defendants argued there was insufficient evidence of their personal participation as supervisors. Judge Posner of the Seventh Circuit agreed that "[t]he least extensive participations were those of the supervisory officers," but nonetheless held that "[t]here was, however, enough evidence to enable the jury to infer that Deas, Griffith, and Palmer had known every false step taken by the subordinate officers, had approved every false step, and had done their part to make the scheme work. . . ." *Id.* at 992, 993.

Police never solved Sheila Pointer's murder. And none of the officers involved were ever disciplined. *Id.* at 991. The only person to face disciplinary charges was Detective Laverty – the whistleblower who revealed the "street files" policy – charges that were quietly dropped.

In the absence of discovery, plaintiffs do not have access to and therefore cannot allege the specific

details of the police investigations which deprived them of their rights. Discovery was necessary to reveal the ways in which police detectives suppressed exculpatory evidence and their officers set policies that led directly to constitutional violations. By requiring Jones to allege greater factual detail in order to overcome the supervisors' qualified immunity, the heightened pleading standards proposed by the Petitioners, would have wrongly allowed them to escape liability for the tragedy the befell George Jones.

C. Carlos Gutierrez-Rodriguez: Failure to Supervise Violent Subordinates

The tragedy of Carlos Gutierrez-Rodriguez illustrates the importance of discovery in establishing the liability of police officials for the constitutional violations of habitually violent officers under their command. Gutierrez was 22 years old when undercover narcotic officers shot and permanently paralyzed him. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989). Prior to the shooting, Gutierrez was regularly employed in Puerto Rico and planning on attending university. On the evening of December 9, 1983, Gutierrez was sitting in his car in the mountains above San Juan, admiring the view of the city with his girlfriend, when an unmarked vehicle approached them. Four plainclothes narcotics officers, led by Pedro Soto exited the unmarked vehicle and approached Gutierrez' car, their guns drawn. Upon seeing the unidentified gunmen approaching his car,

Gutierrez hastily started to drive away. Without warning the police officers began to fire at Gutierrez and his girlfriend. One of the bullets struck Gutierrez in the back, damaging his spinal cord and permanently paralyzing him from the waist down. *Id.* at 557.

Gutierrez brought an action under 42 U.S.C. § 1983 against Soto and the other three plainclothes officers who fired upon him, as well as against Domingo Alvarez, the director of the narcotics division and Desiderio Cartagena, the police superintendent. The jury found that the defendants had violated Carlos's constitutional right to due process and awarded him $4.5 million in compensatory damages jointly and severally against all defendants, as well as hundreds of thousands in punitive damages, including $225,000 against Alvarez and $150,000 against Cartagena. *Id.* at 557-58.

The jury's finding of supervisory liability by Alvarez and Cartagena was affirmed by the First Circuit, which held that the deliberate indifference by Alvarez and Cartagena caused Gutierrez' injuries. The court found that as Soto's supervisor, Alvarez was aware of Soto's long history of using excessive force against civilians and Soto's general reputation for violence. *Id.* at 562. Soto had more complaints against him for brutality than any officer in the narcotics division. Just a few months prior to the shooting of Gutierrez, Soto had been suspended for five days for holding a physician at gunpoint while officers under his command beat the doctor. Despite his concerns

about Soto, including his fear that Soto's violence could spark a riot, Alvarez took no action against Soto such as assigning him to a desk, requesting his transfer or restricting his leadership role. *Id.* at 563.

In affirming Cartagena's supervisory liability, the First Circuit held that the evidence was sufficient for the jury to find that Cartagena was aware of Soto's history of violent and illegal behavior and that Cartagena employed a wholly inadequate and impotent disciplinary system which made it possible for officers like Soto to engage in unconstitutional conduct with impunity. Superintendent Cartagena was responsible for establishing police department policies and procedures and to ensure that these policies and procedures were implemented. Cartagena had the sole authority to suspend or fire an officer. Nonetheless, Cartagena dismissed 12 of 13 civilian complaints against Soto. Moreover, Cartagena refused to consider an officer's past conduct when evaluating complaints of misconduct, thus rendering himself willfully blind to patterns of misconduct. *Id.* at 565-66.

Absent discovery, Gutierrez would never have been able to adequately allege the specific policy-making and implementation roles of Alvarez and Cartagena or their knowledge of Soto's history of violent and illegal conduct. Gutierrez would have had no access to the information which revealed Alvarez's and Cartagena's repeated failure to sanction or discipline Soto, the very facts necessary to specify how these supervisors were deliberately indifferent to

the violation of Carlos Gutierrez' constitutional rights.

The Second Circuit's standard would have permitted the discovery necessary to remedy constitutional violations by supervisory officers against plaintiffs like Carlos Gutierrez-Rodriguez. Yet under the heightened pleading standard proposed by Petitioners, Gutierrez' complaint against Alvarez and Cartagena would have been dismissed for failing to allege the very facts that were later uncovered during discovery. Petitioners' proposed pleading standard would have left Carlos Gutierrez-Rodriguez without any remedy against Alvarez and Cartagena, and would have enabled defendants to escape accountability for their unconstitutional actions.

D. Annabelle Lipsett: Supervisory Indifference to Sexual Harassment

The case of Annabelle Lipsett exemplifies the difficulties faced by plaintiffs suffering discrimination in the school or workplace. Lipsett was repeatedly sexually harassed while a surgical resident at the San Juan, Puerto Rico VA Hospital. *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). Her fellow residents and supervisors continually made clear their views that women should not be surgeons, made sexual remarks about her in her presence, and publicly displayed sexually explicit drawings of the plaintiff's body. Lipsett was warned not to complain about the harassment or else she would be dismissed

from the residency program. Two of her superiors, Dr. Rehuel Rivera and Dr. Luis Morales, offered to alleviate Lipsett's harassment if she had sex with them. When Lipsett rejected their propositions, Drs. Rivera and Morales became hostile. *Id.* at 887-88.

Dr. Rivera subsequently retaliated against Lipsett by assigning her work typical for first year residents, but was viewed as punishment for second year residents such as Lipsett. When Lipsett complained, Dr. Rivera increased the amount of work. Lipsett subsequently appealed to Dr. Roberto Novoa, who further retaliated against Lipsett for resisting the orders, by increasing her punishment. Despite raising the issue of the punishment and discussing the general pattern of harassment with the directors of the department of surgery, Dr. Gonzalez and Dr. Blanco, no action was taken to ameliorate conditions. Rather, further retaliation ensued when her male supervisors filed false complaints against her. Acting on the basis of the these complaints, which they knew were retaliatory, Drs. Gonzalez, Blanco and Pedro Santiago, Dean of the Medical School, dismissed Lipsett from the residency program. *Id.* at 888-92.

Lipsett brought action under Title IX and 42 U.S.C. § 1983 alleging she was discriminated against because of her sex. She alleged that Drs. Gonzalez, Blanco and Santiago, were liable for the discrimination and harassment she faced due to their gross negligence. A jury returned a $525,000 verdict for Lipsett against the defendants, including those liable as supervisors. *Lipsett v. University of Puerto Rico*,

759 F. Supp. 40 (D. Puerto Rico 1991). The supervisory defendants sought to overturn the verdict against them on the basis of qualified immunity. In upholding the jury's verdict, the District Court found that there was an affirmative link between the defendants' deliberate indifference and the violation of Lipsett's rights. *Id.* at 56.

In rejecting an earlier motion for summary judgment submitted by the supervisory defendants, the First Circuit held that there was sufficient evidence the defendants were aware that the disciplinary actions taken against Lipsett were pretextual and retaliatory. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 903 (1st Cir. 1988). The First Circuit further found that Lipsett had presented sufficient facts to establish that Drs. Blanco and Gonzalez failed to investigate or remedy the sexual harassment she faced and that Drs. Blanco, Gonzalez, and Santiago had relied upon the pretextual complaints in their decision to terminate her. *Id.* at 903. Yet Lipsett presented these facts only *after* discovery. Without discovery Lipsett could not have known what investigative or disciplinary action was taken by the supervisory defendants or their knowledge that the complaints against her were made on a discriminatory basis.

The case of Annabelle Lipsett shows the necessity of discovery in civil rights cases alleging the deliberate indifference of supervisors to sexual discrimination and harassment. Under the standard articulated by the Second Circuit, Lipsett would have been able

to conduct the discovery necessary to determine what knowledge Drs. Blanco, Gonzalez, and Santiago possessed regarding the actions of their subordinates and what actions these supervisors took or failed to take. But the heightened pleading standard proposed by Petitioners would have immunized civil rights violators for their illegal actions and prevented Annabelle Lipsett from holding these supervisors liable for violating her constitutional rights.

* * *

Civil rights litigation is a crucial tool to protect fundamental rights, and carefully managed discovery permits the full and fair enforcement of those rights. Petitioners' proposed departure from traditional pleading standards and undue restriction of judicial discretion to manage discovery would put plaintiffs in an intolerable Catch-22. As the cases above illustrate, in too many common situations, Petitioners' heightened pleading standard would systematically disadvantage civil rights plaintiffs and unfairly immunize civil rights violators.

CONCLUSION

This Court should not require a heightened standard of pleading either to defeat the defense of qualified immunity or to allege supervisory liability for the violation of Constitutional rights. The Second Circuit's "flexible plausibility" standard far better guides district court discretion to balance defendants' need for full notice against plaintiffs' need for full discovery. For the foregoing reasons, *Amici* respectfully request that the Court uphold the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

HAROLD HONGJU KOH
(*Counsel of Record*)
HOPE R. METCALF
ALLARD K. LOWENSTEIN INTERNATIONAL
HUMAN RIGHTS CLINIC –
NATIONAL LITIGATION PROJECT
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06513
(203) 432-9404

CRISTÓBAL JOSHUA ALEX
MARIANNE ENGELMAN LADO
NATIONAL CAMPAIGN TO
RESTORE CIVIL RIGHTS
151 West 30th Street, 11th floor
New York, NY 10001
(212) 244-4664

Counsel for Amici Curiae

Appendix: Amici Curiae

The **Asian American Justice Center** (AAJC) is a national, nonprofit, nonpartisan organization dedicated to advancing the human and civil rights of Asian Americans and others through advocacy, policy, public education, and litigation. We are among the nation's leading experts on discrimination and immigrant rights issues. The detention and mistreatment of thousands of Arabs, Muslims, and South Asians after 9/11 resembles that of Japanese Americans during World War II. Given that Asian Americans continue to be impacted by discriminatory policies, AAJC is committed to pursuing accountability at our highest levels of government.

The **Asian American Legal Defense and Education Fund** (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF in its various civil rights litigations has sought to hold the ultimate decision-makers responsible for the unlawful actions charged in the lawsuits. The petitioners' position, herein, would set back civil rights enforcement by effectively limiting those actions to the persons who often do not themselves make the decisions to violate the civil rights of others, but who are merely "following orders."

The **Bill of Rights Defense Committee**'s mission is to promote, organize, and support a diverse, effective, national grassroots movement to restore and protect civil rights and liberties guaranteed by the Bill of Rights. Our purpose is to educate people about the significance of those rights in our lives; to encourage widespread civic participation; and to cultivate and share the organizing tools and strategies needed for people to convert their concern, outrage, and fear into debate and action to restore Bill of Rights protections. We want to ensure that diverse plaintiffs continue to have access to an independent judiciary in order to enforce rights.

CASA de Maryland, Inc., the state's oldest and largest immigrants' rights organization, provides social, medical, educational, legal and advocacy services to immigrants from around the world. Through its work, CASA seeks to protect the rights and dignity of all human beings regardless of immigration status.

The **Center for Justice and Accountability** (CJA) is a San Francisco-based human rights organization dedicated to deterring torture and other severe human rights abuses through litigation, education and outreach. CJA uses litigation to hold perpetrators individually accountable for human rights abuses and to advance the rule of law. CJA has been counsel on many human rights cases against former foreign government officials. CJA has an interest in ensuring the correct application of immunity standards for government officials. CJA also has an interest in civil pleading standards which may limit victims ability to

obtain discovery necessary to establish official responsibility for unlawful conduct.

The **Center for Public Representation** is a public interest law firm that has been assisting people with disabilities for over thirty-five years. It is both a state and a nationwide legal center that provides assistance and support to public and private attorneys who represent people with disabilities, as well as federally funded protection and advocacy agencies in each of the fifty States. It routinely seeks preliminary injunctions on behalf of persons with disabilities to ensure that their constitutional rights, including their right to life-sustaining care, are protected.

The **Council on American-Islamic Relations** is a national organization with headquarters in Washington D.C. and 35 offices across the United States and in Canada. CAIR's mission is to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding. This case highlights CAIR's core values, specifically our commitment to protecting the civil rights of all Americans, regardless of faith or nationality; oppose domestic policies that limit civil rights or permit racial, ethnic or religious profiling, infringe on due process, or that prevent Muslims and others from participating fully in American civic life; and support religious or secular groups that advocate justice and human rights.

Disability Rights Oregon (DRO) is a federally funded law office charged with protecting the rights of people with disabilities. It is part of a network of disability rights offices in all 50 states, the District of Columbia and federal territories. DRO legal staff provide, *inter alia*, representation in individual and class action lawsuits in federal court, often naming the Governor and the Director of the Department of Human Services. Establishing the participation of these high level officials in development of policy that results in violation of clients' civil and constitutional rights is key to both establishing liability and ensuring that any settlement reached will be effective and enforceable. DRO therefore has an interest in ensuring that it can prevail in its cases by obtaining the discovery necessary to hold high level officials liable.

Equal Rights Advocates (ERA) is a San Francisco-based human rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. ERA has litigated historically important civil rights cases in both state and federal courts since it was founded in 1974, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), and has appeared as *amicus curiae* in scores of state and federal civil rights matters involving the interpretation and application of procedural and substantive laws affecting the access to justice. The issues raised in this case are of vital import to ERA, particularly

with respect to our client base of students and employees who experience discriminatory practices and policies instituted at the highest levels of their educational and corporate institutions, whose efforts to seek justice under our remedial statutes would be frustrated by heightened pleading standards in actions involving supervisory liability.

Equal Justice Society (EJS) is a national civil rights organization comprised of lawyers, scholars, advocates and citizens that seeks to protect fundamental human rights and promote enduring social change through law and public policy, public education and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Specifically, EJS works to ensure that antidiscrimination law and jurisprudence continues to adequately address racial and societal inequities. Consistent with that mission, EJS advocates on behalf of individuals whose constitutional rights have been violated by the action and inaction of officials and other decision-makers. In joining *amici*, EJS urges the Court to protect the ability of individual plaintiffs to seek legal redress for unconstitutional policies and actions.

The **Fair Immigration Reform Movement** (FIRM) is a national coalition of grassroots organizations fighting for immigrant rights at the local, state and federal level.

The **Idaho Community Action Network** (ICAN) is committed to economic, social, and racial

justice for all. Our mission is to provide a voice for Idahoans committed to progressive social change and to develop the power necessary to create those changes. ICAN is interested in this case because we believe in protecting our civil rights. An infringement on one person's or one group's civil rights has ramifications for all of us.

LatinoJustice PRLDEF is an independent national nonprofit civil rights litigation and advocacy organization which has defended the constitutional rights, civil rights and the equal protection of all Latinos under law. Since 1972, PRLDEF's mission has been to promote civic participation, to cultivate Latino leaders, and to promote voting rights, employment opportunity, fair housing, language rights, educational access, and, immigrants rights.

The **Law Foundation of Silicon Valley** is a private nonprofit corporation that sponsors five free legal services and advocacy programs, including Public Interest Law Firm (PILF), which has a strong interest in the outcome of this matter. The Law Foundation of Silicon Valley is located in and provides free legal services in Santa Clara County, California. PILF's mission is to protect the civil rights of individuals and groups who are underrepresented in the civil justice system through class action and impact litigation. PILF focuses its efforts on behalf of individuals with disabilities, youth, elders, people who are frequent victims of illegal discrimination and people who have low incomes. Were the heightened pleading standard urged by Petitioners in

this action to become law, many of these and other important and meritorious civil rights actions pursued by PILF would be inappropriately threatened with dismissal at an early stage of the case. Thus, the outcome of the instant matter is of intense importance to PILF and its clients.

Maryland Disability Law Center (MDLC) is the federally designated protection and advocacy organization for the state of Maryland. MDLC is a nonprofit organization charged with advancing and protecting the legal rights of persons with disabilities. MDLC has filed several §1983 civil rights cases on behalf of persons with mental or developmental disabilities against state hospitals or institutions. As private attorneys' general, MDLC must determine whether there is sufficient legal basis to allege violation of rights against state actors based on claims reported by clients. The claims involve abuse, neglect and failure to provide a constitutionally adequate standard of care. State institutions are not open to the public. Their operations are protected from scrutiny under the rubrics of patient privacy and medical peer review. Persons committed to state facilities face inordinate obstacles to bringing a legal action against their wardens. MDLC has brought suits against state officials that has resulted in the referral of multiple criminal charges against staff for assault of patients; imposition of new processes to track complaints of abuse and neglect; and improvements in health care. Information obtained through

discovery has been vital to obtaining full and appropriate injunctive relief for clients. MDLC's interest in the pleading standard related to qualified immunity may be illustrated in the example of an action against state officials on behalf of a fifteen year old patient who was raped by staff at the state facility for youth with mental disabilities. Prior to discovery it was not known that a criminal background check had not been conducted on the staff or that ten other minor patients had made complaints of inappropriate sexual conduct by the same staff person. If pleading standards are altered from existing Federal Rules, the system wide relief that MDLC prioritizes for its clients will be tremendously diminished, not due to a lesser need for broad based systemic relief, but due to a lesser ability to join those state officials tasked with general administrative functions and control.

The **Maurice & Jane Sugar Law Center for Economic & Social Justice** (Sugar Law Center) has both a strong interest in the litigation and expertise in the matter at bar. The Sugar Law Center is a Detroit-based national nonprofit, public-interest law center affiliated with the National Lawyers Guild. Since its founding in 1991, the SLC has pursued justice through the dissemination of information, advocating changes in existing legislation, and through the litigation of cases. The organization seeks to promote a greater understanding of civil and human rights. Sugar Law directly assists individuals who depend on having meaningful access in the judicial system to litigate core Constitutional rights

and to hold companies and governmental bodies and agents accountable for violating their rights.

The **Mexican American Legal Defense and Educational Fund** (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy, and education.

The **Michigan & Detroit National Lawyers Guild** has a strong interest in the litigation and expertise in the matter at bar. The Michigan & Detroit NLG is a statewide association of attorneys and legal workers. Among its members, are numerous civil rights attorneys. The organization seeks to advance greater recognition of persons' human rights within the political and legal system, including the rights of individuals to have direct access to justice when these rights are violated. Michigan & Detroit NLG members have litigated hundreds of cases involving the rights of persons to be free from discrimination, unlawful arrests and imprisonment, and the right to hold governmental bodies and agents accountable for violation of these rights.

The **National Asian Pacific American Bar Association** (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors and law students. NAPABA represents the interests of over 40,000 attorneys and approximately 57 local Asian Pacific American bar associations. Its members include solo practitioners, large firm lawyers,

corporate counsel, legal service and nonprofit attorneys, and lawyers serving at all levels of government. Since NAPABA's inception in 1988, it has promoted justice, equity and opportunity for Asian Pacific Americans, as the national voice for Asian Pacific Americans in the legal profession. These efforts have included civil rights advocacy on various fronts. NAPABA joins amici to protect the ability of litigants to pursue judicial remedies to hold government officials accountable for setting unconstitutional policies and condoning constitutional violations by subordinates, including misconduct motivated by racial animus.

The **National Center for Lesbian Rights** (NCLR) is a national legal organization committed to advancing the human and civil rights of the lesbian, gay, bisexual, and transgender community through litigation, public policy advocacy, and public education. Since its inception in 1977, NCLR has worked to ensure that all persons receive the protections of the basic civil liberties guaranteed by the United States Constitution, and thus has a particular interest in the rejection of a heightened pleading standard in civil rights and civil liberties cases involving supervisory liability. NCLR is interested in this case because the rights at issue are fundamental for all people and their infringement by the government poses a serious risk to the dignity and freedom of all.

For over thirty years, the **National Health Law Program** (NHeLP) has engaged in legal and policy analysis on behalf of low income people, people with

disabilities, the elderly and children. NHeLP has provided legal representation, conducted research and policy analysis on issues affecting the health status and health access of these groups. We work to help consumers and their advocates overcome barriers to health care, including a lack of affordable services or access to health care providers. The Program's work includes enforcement of the Americans with Disabilities Act, and our work and clients could therefore be affected by the Court's decision in this case.

The **National Immigrant Justice Center**, a partner of Heartland Human Care Services, is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education.

The **National Immigration Law Center** (NILC) is a nonprofit national legal advocacy organization whose mission is to protect and promote the rights and opportunities of low-income immigrants and their family members. Ensuring that immigrants are treated fairly and that their rights are respected in the course of government enforcement of immigration law is a priority for the organization. Because the outcome of this case may affect the ability of low-income immigrants to obtain redress for violations of their rights, NILC has a fundamental interest in this case.

The **National Korean American Service & Education Consortium** (NAKASEC) was founded in 1994 by local community centers seeking to empower and improve the lives of Korean Americans, as a part of a greater goal of building a national movement for social change. Our affiliates provide programs in education, social services, culture, civic engagement and organizing that address the full human & political needs of community members. Our mission is to project a national progressive voice on major civil rights and immigrant rights issues and promote the full participation of Korean Americans in American society.

The **National Law Center on Homelessness & Poverty** (NLCHP) is a nonprofit organization based in Washington, D.C., established in 1989 to advocate for homeless and low-income people nationwide. Through litigation, policy advocacy and public education, NLCHP works to promote, preserve, and enforce the civil and constitutional rights of homeless and low-income people, who are frequently without effective political voice or power. NLCHP has been involved in litigation in a number of different civil rights contexts, such as challenges to mistreatment of homeless persons by local governments and police departments, challenges to barriers to voting by homeless people, and efforts to ensure that homeless people are afforded the protections of the federal Fair Housing Act.

The **National Police Accountability Project** (NPAP) was founded in 1999 by members of the

National Lawyers Guild (NLG), the first racially integrated national bar association. NPAP was founded with the intent of helping to end police abuse of authority and to provide support for grassroots and victims' organizations combating police misconduct. NPAP has nearly 400 members across the country. The project provides training and support for attorneys and legal workers; public education and information on issues relating to police misconduct; information and resources for nonprofit and community groups who work with victims of police abuse; support for legislative reform efforts aimed at raising the level of police accountability; and a forum for legal professionals and community organizations to come together and creatively work to end police misconduct.

One of the important missions of NPAP is to promote the accountability of police officers, and their supervisors and employers for violations of the Constitution or laws of the United States. Demanding heightened pleading standards in civil rights and civil liberties cases involving supervisory liability would have long-reaching implications and would diminish the ability of plaintiffs to hold supervisors accountable for constitutional and statutory violations.

The **National Women's Law Center** (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has worked to secure equal opportunity for

women through full enforcement of their constitutional and statutory rights. It has filed and participated in numerous *amicus* briefs before this Court.

New York Lawyers for the Public Interest (NYLPI) is a nonprofit public interest law firm founded in 1976. Staff attorneys engage in advocacy and litigation in the areas of disability rights, access to healthcare, and environmental issues on behalf of disadvantaged and underrepresented people throughout New York City. NYLPI has an interest in both the standards for establishing immunity for governmental officials and civil pleading standards. The question of whether heightened pleading standards apply has recently been raised during the course of NYLPI's litigation.

The **Northwest Women's Law Center**, based in Seattle, Washington, is a nonprofit public interest legal organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, the Law Center has been dedicated to protecting and securing equal rights for women and their families, including in the workplace, in educational institutions, in prison, and elsewhere. Toward that end, the Law Center has participated as counsel and as *amici curiae* in cases throughout the Northwest and the country, including bringing suit on behalf of women inmates in Alaska for equal access to programs and services offered to male inmates and representing incarcerated women in Washington

receiving inadequate health care. The Law Center is currently involved in numerous legislative and litigation efforts to protect and expand civil rights. The Law Center continues to serve as a regional expert and leading advocate on women's civil rights issues.

The **South Asian Bar Association of Northern California** (SABA-NC) is a nonprofit, membership-supported organization of lawyers working to advance the interests of South Asian attorneys within the legal profession, and the interests of South Asian communities in the broader U.S. community. Among SABA-NC's goals as a bar association is to ensure that individuals of South Asian origin in the United States enjoy the greatest possible protection of their civil rights under the law. SABA-NC and its over 400 members therefore have a strong interest in the legal standards applicable to claims of government immunity asserted by supervisory defendants in civil rights litigation alleging violation of fundamental constitutional rights. Application of the heightened pleading standard urged by Petitioners would render it more difficult for South Asian civil rights plaintiffs in Northern California to assert legal claims concerning civil rights violations designed and implemented at the highest ranks of government. As the largest regional organization of South Asian lawyers in the United States, whose work has included advocating the interest of numerous individuals alleging infringement of their constitutional rights in the wake of the post-9/11 law enforcement dragnet targeting individuals of South Asian and Middle Eastern descent

within the United States, SABA-NC has a unique perspective on the issue to be determined by this Court. SABA-NC adds its voice to the undersigned *amici* in this matter who also speak for constituencies who may be negatively impacted by the application of a heightened pleading standard as asserted by Petitioners.

The **Southern Coalition for Social Justice** is a nonprofit public interest advocacy organization that promotes justice by empowering minority and low-income communities in the South to defend and advance their political, social and economic rights. We participate in litigation on behalf of our clients, seeking redress for violations of their civil rights. Supervisory liability is a crucial component of such cases, and frequently it is difficult for plaintiffs to know the full extent of a supervisor's role in decision-making without the opportunity to use discovery tools in litigation. We have an interest in making sure that our clients' rights are fully protected and oppose a heightened pleading standard for plaintiffs in civil rights cases, particularly for supervisory liability, because it would present a significant barrier to that goal.

The **Walter Leitner International Human Rights Clinic** of the Leitner Center for International Law and Justice at Fordham Law School in New York City aims to train a new generation of human rights lawyers and to inspire results-oriented, practical human rights work throughout the world. The Leitner Clinic works in partnership with non-governmental

organizations and foreign law schools on international human rights projects ranging from legal and policy analysis, fact-finding and report writing, and human rights training and capacity-building.

The **World Organization for Human Rights USA** (Human Rights USA) is a nonprofit, public interest human rights organization dedicated to ending torture, gender-based violence, and other major human rights abuses, using litigation in the United States as the primary tool for accomplishing these goals. Human Rights USA's staff has extensive experience litigating issues regarding U.S. adherence to international human rights standards, as well as human rights norms incorporated into U.S. domestic law, particularly the Convention Against Torture and its implementing legislation. This litigation has included a number of civil actions under the ATS and the TVPA dealing with corporate accountability, FSIA, and act of state issues. We also were named amicus curiae in the first criminal prosecution under the Convention Against Torture, the case against Chuckie Taylor of Liberia. Human Rights USA is an affiliate of the World Organization Against Torture (Organisation Mondiale Contre La Torture, or "OMCT") network, composed of over 200 similarly situated human rights organizations around the world, each focusing on their own nation's human rights compliance issues and needs.

AMICUS CURIAE BRIEF

OCT. 30, 2008

No. 07-1015

In The
Supreme Court of the United States

JOHN D. ASHCROFT, et al.,

Petitioners,

v.

JAVAID IQBAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AND FEDERAL PRACTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ALLAN IDES
Counsel of Record
919 Albany Street
Los Angeles, CA 90041
(213) 736-1464

DAVID L. SHAPIRO
1565 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4618

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICI CURIAE*

This brief is written on behalf of a group of law professors who teach and write in the areas of Civil Procedure and Federal Practice. *See* Appendix A (listing *amici*). Our interest is in promoting an approach to pleading practice under the Federal Rules of Civil Procedure that comports with this Court's precedents, with the text of Rules 8(a)(2) and 9, and with the formalities of the rulemaking process.

Our focus here is not on the merits of the controversy between the Petitioners and the Respondent. Rather our interest lies in preserving both the structure of the Federal Rules and the framework for establishing and amending those rules under the Rules Enabling Act, 28 U.S.C. § 2072 – a framework the Government here seeks to circumvent.*

SUMMARY OF ARGUMENT

This case presents this Court with an ideal opportunity to clarify the scope of its decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). The

* The parties, including all parties to the Second Circuit proceedings, have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Loyola Law School, Los Angeles, California, paid for the cost of printing and filing this brief. No other person or entity made any monetary contribution to the preparation and submission of this brief.

Bell Atlantic opinion has been cited over 6,500 times by lower federal courts, many of which have expressed confusion over the proper interpretation and application of that decision. The basic question confronting those courts is whether the *Bell Atlantic* decision created a new, heightened pleading standard. The answer, we submit, was supplied by the Court itself in *Bell Atlantic* when it said, "[W]e do not apply any 'heightened' pleading standard . . . ," 127 S.Ct., at 1973 n.14, and, "[W]e do not require heightened fact pleading of specifics." *Id.*, at 1974. Yet despite the clarity of the Court's pronouncement, the confusion persists. As a consequence, a clarification may be necessary to prevent the erosion of long-standing pleading standards and to reaffirm this Court's oft-stated commitments both to a consistent interpretation of Rule 8(a)(2) that does not vary from case to case, and to an insistence that the rules may be changed only though the processes established by law.

The essence of our argument is that *Bell Atlantic* did not alter pleading standards, and, specifically, did not apply or endorse in any manner the use of variable or heightened pleading standards. That is, after all, what the *Bell Atlantic* Court said. Indeed, it is our view that this Court's entire pleading jurisprudence under Federal Rule of Civil Procedure 8(a)(2), including its decision in *Bell Atlantic*, emphatically rejects the imposition by judicial decision of variable or heightened pleading standards. As we explain below, the *Bell Atlantic* "plausibility standard" works no

change in this jurisprudence. The Government here, however, asks this Court to impose a heightened pleading standard – a variable specificity standard – in the context of lawsuits alleging constitutional claims against "high-level government officials" who assert a qualified immunity defense. In our view the Government's invitation is inconsistent with Rule 8(a)(2)'s pleading standards and with this Court's numerous admonitions against the judicial creation of variable or heightened standards under the Federal Rules.

In addition, we submit that the Government has adopted an amorphous approach to qualified immunity that muddies the waters of both the qualified immunity defense and long-established pleading standards under Rule 8(a)(2). Finally, it is the view of *amici* that the Second Circuit, in the decision below, properly and carefully accommodated accepted pleading standards, as well as other components of the Federal Rules, to the policies underlying the actual doctrine of qualified immunity. We, therefore, urge this Court to affirm that decision.

ARGUMENT

I.
Introduction

This Court's opinion in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), has generated a lively debate regarding the current status of pleading

standards under Federal Rule of Civil Procedure 8(a)(2). The opinion has been cited over 6,500 times by lower federal courts. Many of those courts have expressed uncertainty as to the intended scope of the Court's opinion, particularly with respect to what some have perceived to be *Bell Atlantic*'s new "plausibility" standard. Included among those expressions of uncertainty is the opinion of the Second Circuit issued in this case. *Iqbal v. Hasty*, 490 F.3d 143, 155-157 (2d Cir. 2007) (considerable uncertainty and conflicting signals regarding "the plausibility standard"); *accord Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008); *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541 (6th Cir. 2007).

Out of this uncertainty, a variety of opposing interpretations of *Bell Atlantic* have emerged. Some courts have read the opinion as an unremarkable application of long-standing pleading principles, while others have discovered the outlines of a variable or heightened "plausibility" standard within the contours of the Court's opinion. *Compare Aktieselskabet AF 21. November 2001 v. Fame Jean Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) ("*Twombly* leaves the long-standing rules of notice pleading intact."), *with Brotherhood of Locomotive Engineers v. Union Pacific RR Co.*, 537 F.3d 789, 791 (7th Cir. 2008) (Easterbrook, J., and Posner, J., concurring) ("In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier."); *see also Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 974 (11th Cir.

2008) (holding allegation that plaintiffs were "denied promotions . . . and treated differently than similarly situated white employees solely because of . . . race" to be inadequate because it "epitomizes speculation" under *Bell Atlantic* standard). Although, as we explain below, we believe that the Court's opinion in *Bell Atlantic* did not alter pleading standards, we do agree that certain aspects of the opinion's text might suggest to the contrary. *See Iqbal*, *supra*, 490 F.3d, at 155-157. Given the resulting uncertainty, coupled with the significant gatekeeping function of federal pleading practice, a clarification by this Court would be more than beneficial.

But more is at stake here than the clarification of a recent decision. An interpretation of *Bell Atlantic* that invites a case-by-case evolution of variable and heightened pleading standards not only threatens simple and long-established pleading standards, but would work an amendment to the texts of Rules 8(a)(2) and 9 outside the rulemaking process under which those rules were adopted. The perception that the Court has shaped a new and variable heightened pleading standard in *Bell Atlantic* thus opens a jurisprudential window that has the potential to destabilize the carefully constructed rulemaking process envisioned by Congress under the Rules Enabling Act and painstakingly administered by the Court since 1934.

This Court has consistently reaffirmed its commitment to that rulemaking process and to the textual integrity of the individual rules, and, more

specifically, to the general standard of pleading established by Rule 8(a)(2) and the specific standards provided by Rule 9. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 504 U.S. 163, 168 (1993). Given the percolating uncertainty as to the intended scope of *Bell Atlantic*, a reaffirmation of these commitments is imperative.

This case presents a particularly good vehicle through which to accomplish these ends. First, as will be explained below, the pleading standards described and applied in *Bell Atlantic* fully justify the decision below without the need for nuance or caveat and without introducing any notion of a variable or heightened pleading standard. Second, although the Government denies that it is seeking to alter pleading standards, the actual standard it asks the Court to impose – a specificity standard – is a new pleading requirement that is heightened in everything but name. As a consequence, this case squarely presents the question of whether *Bell Atlantic* invites lower federal courts to adopt an *ad hoc* variable pleading standard. That approach should be firmly rejected. Third, the Court can accomplish the mission of clarification and reaffirmation without in any manner undermining the policies underlying the doctrine of qualified immunity. Indeed, the Second Circuit's opinion provides a commendable example of a court adhering to traditional pleading standards and, at

the same time, honoring the policies at the heart of the qualified immunity defense.

II.
The "Substantive Law" Interpretation of *Bell Atlantic v. Twombly*

The Government invites this Court to interpret *Bell Atlantic* as endorsing the development by judicial decision of variable and heightened pleading standards. Brief for the Petitioners, at 28 ("specific, nonconlusory factual allegations" needed in suits against "high-level government officials"); *but cf. Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) ("[s]pecific facts are not necessary" under Rule 8(a)(2)). While there is some language in the *Bell Atlantic* opinion that, read in isolation, might support the Government's invitation, we think that the clear import of the *Bell Atlantic* opinion is to the contrary, and properly so, given the text of Rules 8(a)(2) and 9 and given this Court's consistent and *unanimous* rejection of heightened pleading standards other than those specifically provided in Rule 9 or by superseding congressional enactment. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002) (unanimous opinion delivered by Justice Thomas); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 504 U.S. 163, 168 (1993) (unanimous opinion delivered by Chief Justice Rehnquist).

The Court in *Bell Atlantic* certainly did not endorse or apply any type of a variable or heightened

pleading standard. Indeed, it expressly denied that it was doing any such thing. 127 S.Ct., at 1973 n.14 & 1974. Moreover, the overarching concern of the *Bell Atlantic* Court was not the technicalities of pleading, but the substantive law of the Sherman Act. In this respect, the *Bell Atlantic* Court's statement of the issue presented is revealing: "whether a § 1 [Sherman Act] complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action?" 127 S.Ct., at 1961. As the issue presented itself suggests, the rationale for the Court's negative answer was a product of the law of the Sherman Act and not a consequence of novel pleading standards. Indeed, the statement of the issue tells the reader that the case is more about the elements of a Sherman Act claim than it is about pleading.

Consistent with the foregoing, in Part II A of its opinion in *Bell Atlantic*, the Court explains that the presence of an anticompetitive agreement is a critical element of a § 1 Sherman Act claim. 127 S.Ct., at 1964. The existence of such an agreement can be established through direct evidence – the so-called smoking gun – or though inferences drawn from circumstantial evidence such as "parallel conduct," *i.e.*, parallel patterns of anticompetitive conduct undertaken by like-situated market actors. Under the law of the Sherman Act, however, parallel conduct by such market actors is presumed to be the product of

independent, market-driven behavior premised on "common perceptions of the market." *Id.* Therefore, at the proof stage of litigation, evidence of parallel conduct cannot support the inference of an anticompetitive agreement in the absence of other evidence "tending to exclude the possibility of independent action." *Id.* In short, proof of parallel conduct, standing alone, cannot establish a § 1 Sherman Act violation, either directly or by inference. At issue in *Bell Atlantic* was whether this "proof stage" standard should be applied at the pleading stage. In other words, are allegations of parallel conduct, standing alone, sufficient to avoid a Rule 12(b)(6) motion to dismiss? Logically, the answer would seem to be no; and the Court followed that logic.[1]

Part II B of the Court's opinion applies the substantive law of the Sherman Act in determining the adequacy of the plaintiffs' complaint. The pleading standard employed by the Court in this process is unremarkable: A complaint need not contain "detailed factual allegations," but must contain sufficient factual allegations (1) to transcend a "formulaic recitation" of the elements of a claim, (2) to supply fair notice of the claim and the grounds on which it is asserted, and (3) to provide a basis from which to determine whether the purported claim is one on which relief can be granted. *Id.*, at 1964-1965 & n.3.

---

[1] One impediment to the Court's rationale was the factual-impossibility interpretation of the "no set of facts" standard, which the Court respectfully retired. 127 S.Ct., at 1968-1969.

In *Bell Atlantic*, we believe that neither of the first two aspects of the Court's pleading standard was at issue. The question presented, as indicated above, was whether the *Bell Atlantic* complaint stated a claim on which relief could be granted – a classic Rule 12(b)(6) question that focuses on the relationship between the plaintiff's allegations and the substantive elements of the claim.

As noted, the presence of an anticompetitive agreement is an essential element of a Sherman Act claim. The *Bell Atlantic* complaint rested its assertion that the defendants had entered such an agreement exclusively on the inference to be drawn from the alleged parallel conduct engaged in by the defendants; and this is precisely how the Court characterized the complaint. *Id.*, at 1970. The *Bell Atlantic* plaintiffs did not disagree with the Court's characterization. Rather, they argued that the complaint included sufficient allegations of "plus factors" to rebut the presumption that the alleged parallel conduct was a product of independent action. The Court rejected these plus factor allegations as insufficient as a matter of the law of the Sherman Act and not as a matter of pleading deficiency. *Id.*, at 1972-1973. The net result of the Court's analysis was that the *Bell Atlantic* complaint contained a fatal substantive gap. In the Court's view, the essential element of an unlawful agreement was not supported by any allegations from which the inference of such an agreement could be drawn. That being the case,

plaintiffs had failed to state a claim on which relief could be granted.

Thus, the plaintiffs' complaint was deficient, not because of any technical rule of pleading, but as a result of the fatal substantive gap created by plaintiffs' exclusive reliance on agreement-neutral parallel conduct. The implausibility of the complaint, therefore, was a product of substantive law filtered through unremarkable pleading standards. Since the plaintiffs had alleged no "plausible" grounds for relief, *i.e.*, no claim on which relief could be granted, the only remedy was dismissal of the complaint. *See id.*, at 1966 (a claim "shy of a plausible entitlement to relief" does not trigger a right to discovery).

On the way to its substance-driven conclusion, the *Bell Atlantic* Court used a variety of phrases to describe pleading standards, some of which could be construed as altering the pleading landscape. *See Iqbal v. Hasty*, *supra*, 490 F.3d, at 155-157 (discussing "conflicting signals"). We think, however, that an interpretation of *Bell Atlantic* that focuses on what the Court actually held in that case will contextualize the language used and go a long way toward eliminating any potential ambiguity or "conflicting signals" derived from the Court's opinion. However, given that many lower courts have focused on what they describe as *Bell Atlantic*'s new "plausibility standard," a closer examination of "plausibility" is in order.

III.
Understanding the *Bell Atlantic* "Plausibility Standard"

As noted, after a detailed examination of plaintiffs' complaint in light of the underlying law of the Sherman Act, the *Bell Atlantic* Court concluded that the plaintiffs had failed to allege a "plausible" claim for relief under the Act. 127 S.Ct., at 1974. As a consequence, the Court explained, "their complaint must be dismissed," for it failed to cross the line that separates the "conceivable" from the "plausible." *Id.* Implicitly, only plausible claims can survive a Rule 12(b)(6) motion to dismiss.

The Court used the words "plausible" and "plausibility" some fifteen times in its opinion, including a direct reference to a "plausibility standard," *id.*, at 1968, leading some lower courts and commentators to speculate as to whether the Court had injected a heightened "plausibility" standard into Rule 8(a)(2) pleading doctrine. The Government, in this proceeding, takes the affirmative position on that question, arguing for a heightened pleading standard, a point to which we will return in the next section.

The *Bell Atlantic* Court did not, however, invoke or endorse any type of heightened pleading standard. In the Court's words, "[W]e do not apply any 'heightened' pleading standard . . . ," 127 S.Ct., at 1973 n.14, and, "[W]e do not require heightened fact pleading of specifics." *Id.*, at 1974. The Court reiterated this point two weeks later in *Erickson v. Pardus*, 127 S.Ct. 2197

(2007), when it pointedly cited *Bell Atlantic* for the proposition that under Rule 8(a)(2) "[s]pecific facts are not necessary." 127 S.Ct., at 2200. We take the Court at its word: plausibility neither establishes nor invites the creation of a heightened pleading standard. Our reading of the *Bell Atlantic* opinion confirms one's confidence that the Court meant what it said.

In its discussion and application of pleading principles, the *Bell Atlantic* Court used the concept of plausibility in three different but related contexts. First, it used the concept as a modifier of the grounds from which one might draw an inference of conspiracy – "plausible grounds," 127 S.Ct., at 1965; second, it used it to modify the inference one might draw from those grounds – "facts suggestive enough to render a . . . conspiracy plausible," *id.*; and third, it used it as a descriptive modifier of those claims that satisfy pleading standards – "plausibility of entitle[ment] to relief," *id.*, at 1967. In short, the Court insisted on: 1) the plausibility of particular allegations; 2) the plausibility of inferences drawn from otherwise plausible allegations; and 3) the plausibility of the claim itself.

1. The first of these requirements does not seem to have been at issue in *Bell Atlantic*. The Court did, however, make it clear that implausibility in this context, *i.e.*, the claim of an unlawful conspiracy in violation of the Sherman Act, was not to be equated with improbability. Thus, the implausibility of an allegation could not be established solely because "a savvy judge" might conclude "that actual proof of

those facts [was] improbable, [or] 'that a recovery [was] very remote and unlikely.'" 127 S.Ct., at 1965. On the other hand, implausibility might be established if the plaintiff were to allege a state of affairs that was so beyond the common understanding as to be virtually, if not literally, incredible. And a judge might be particularly wary of such seemingly "incredible" allegations when those allegations might operate as an end-run around the applicable substantive law.

For example, were a plaintiff to allege, in general terms and without further factual elaboration, that a high government official, such as the Attorney General of the United States, was directly responsible for the fact-specific violation of Fourth Amendment rights by a street-level government operative, a court might well conclude that the allegation was implausible in the absence of further factual elaboration. Not only is the allegation wholly inconsistent with the usual understanding of how the various levels of a government agency interact, it posits a scenario that may well operate as an end-run around the applicable substantive law, namely, the limited scope of supervisory liability in a *Bivens* action. A court could, therefore, rightfully demand that plaintiff allege some connective facts to fill in the large, "implausible" blank between the policy-making realm of the high-level government official and the *ad hoc* activities of street-level operatives.

This is the approach to "plausible grounds" adopted by the Second Circuit in its opinion below:

> [W]e believe the [*Bell Atlantic*] Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations *in those contexts where such amplification is needed to render the claim plausible.*

490 F.3d, at 157-158 (emphasis added except as to the word "plausible").

No such "implausible" grounds are at issue in this case. The plaintiff's complaint does not allege that either Attorney General Ashcroft or Director Mueller were responsible for the *ad hoc* behavior of government officials working at the "street" level. In fact, plaintiff Javaid Iqbal's twenty-one count complaint carefully avoids making any such allegations. Thus, while the complaint does charge several individuals with *ad hoc* violations of the plaintiff's rights, *see, e.g.,* Plaintiffs' Second Amended Complaint ("Complaint"): Fourth and Fifth Causes of Action (Excessive Force), neither Ashcroft nor Mueller is named in any of those fact-specific counts. Thus, when Iqbal alleges that he was subject to physical abuse, he names only the specific participants in that abuse and, pointedly, neither Ashcroft nor Mueller is included on that list. *Id.*

By way of contrast, the four surviving claims against Ashcroft and Mueller pertain to constitutional deficiencies in specific policies and directives alleged to have been mandated and overseen by them.

See Complaint: Eleventh, Twelfth, Sixteenth and Seventeenth Causes of Action (claims of intentional religious and racial discrimination embedded in system-wide policies). Those policies and directives, it is alleged, were purposefully designed to discriminate on the basis of religion and race. *See, e.g.*, Complaint, at ¶ 96 ("Defendants ASHCROFT [and] MUELLER . . . each knew of, condoned, and willfully and maliciously agreed to subject plaintiffs to these conditions of confinement as a matter of policy, solely on account of [Plaintiffs'] religion, race, and/or national origin and for no legitimate penological interest."); *see also* ¶¶ 49, 97, 232, 235 & 250 (to the same effect). These allegations may or may not be accurate, and they may or may not be subject to various defenses. A "savvy judge" might even think their proof improbable. They are not, however, implausible. They do not seek to place responsibility on Ashcroft or Mueller for *ad hoc* street level activity or to impose on them any other form of counterintuitive responsibility. Rather, they seek to premise liability on actions undertaken by them within the expected realm of their official capacities, *i.e.*, for creating and overseeing policies within the commonly understood ambit of their respective roles as administrators in high office.

Consistent with the foregoing, the Second Circuit, in its opinion below, concluded that the plaintiff's allegations pertaining to the personal involvement of Ashcroft and Mueller were, from a pleading perspective, "plausible":

> [T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.

490 F.3d, at 175-176; *see also id.*, at 166 (to the same effect). We think the Second Circuit was correct. And to conclude otherwise would move the standard beyond plausibility and into the realm of heightened pleading.

2. The second context in which the Court referred to the requirement of plausibility – the plausibility of the inferences to be drawn from otherwise plausible allegations – was at issue in *Bell Atlantic*, but that reference was limited and highly specialized. In the Court's words, "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." 127 S.Ct., at 1966. The Court then explained that the inference of an anticompetitive agreement cannot, as a matter of law, be drawn from unembellished parallel conduct, despite the consistency of that conduct with the possibility of such an agreement, for under the Sherman Act such parallel

conduct is presumed to be agreement-neutral. Therefore, in this specific context, to draw the inference of an agreement there must be additional allegations that supplement the parallel conduct allegation with allegations from which an anticompetitive agreement can be inferred.

The Court's pleading discussion was thus closely tied to the specific requirements of § 1 claims under the Sherman Act and to the particular problem of parallel conduct as proof of an agreement. One could generalize from that reasoning, however, and conclude that a "neutral" allegation, *i.e.*, an allegation that is simply consistent with an element of a claim, cannot alone support an *inference* of that particular element in the absence of some other claim-supportive allegation that takes the neutral allegation out of neutral territory. For example, a bare allegation that defendant was driving a car near the scene of an accident would not, without more, support an inference of defendant's negligence, much less that defendant had caused the accident.

The plaintiff in this case, however, does not ask the Court to draw any inferences from his allegations. Rather, he alleges directly that Attorney General Ashcroft and Director Mueller created and oversaw the implementation of a policy that, in purpose and effect, discriminated on the basis of religion and race and that the plaintiff was subjected to that policy in action. These allegations stand on their own footing in support of Iqbal's claim and require no inferential

elaboration. Hence, the second aspect of plausibility is not at issue here.

On this point, the presumptively adequate Form 11 Complaint for Negligence found in the Appendix of Forms to the Federal Rules of Civil Procedure is instructive. That complaint alleges, in conclusory terms, that "the defendant negligently drove a motor vehicle against the plaintiff" causing "physical injuries" to the plaintiff. No inferences need be drawn from these allegations, for in and of themselves they state a *claim* of negligence. Just as Form 11 contains no "neutral" allegations in need of additional support, Iqbal's claims against Ashcroft and Mueller are not dependent on the drawing of inferences to adumbrate the elements of those claims.

3. Finally, the third context in which the *Bell Atlantic* Court spoke of plausibility – the plausibility of one's entitlement to relief – incorporates the first two aspects of plausibility into the requirement that the plaintiff must state a claim for which relief can be granted. Thus, one might say that the plausibility of one's entitlement to relief is dependent on whether one's plausible allegations, coupled with any plausible inferences drawn therefrom, state a legally recognized claim. The *Bell Atlantic* Court explained that the *Bell* plaintiffs' complaint fell shy of "plausible entitlement" and thus could not be salvaged through further discovery or careful case management. *Id.*, at 1967. In short, the *Bell* plaintiffs had failed to state a claim for which the law affords relief, and the solution was not further litigation but dismissal.

"Plausibility of entitlement" is not an issue in this case. As explained above, there is no argument that any allegation by Iqbal is implausible; and there is no argument that Iqbal's complaint relies on implausible inferences, for it requires no inferences whatsoever. Finally, there can be no argument that Iqbal's claims under the Free Exercise Clause and the equal protection component of the Fifth Amendment Due Process Clause fail to state a claim on which relief can be granted. These are standard and long-recognized claims, unique only in their factual setting. Given the foregoing, Iqbal's complaint more than adequately alleges his "plausible entitlement" to relief.

The Government addresses and applies the plausibility standard in Part I of its brief. We think that there are two significant errors in the Government's approach, both of which have implications that transcend the immediate case. First, while the Government correctly observes that plausibility is contextual, it applies the plausibility standard to the incorrect context. Thus, while the Government is undeniably correct when it observes that "high-ranking officials . . . ordinarily tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command," Brief for the Petitioners, at 28, it misses the mark when it assumes that this case falls into that presumptively implausible context. Rather, as noted above, the claims asserted by Iqbal against Ashcroft and Mueller are not chain-of-command or as-applied

claims; nor are they claims of supervisory liability. Rather Iqbal's claims are that the defendants *themselves created and oversaw* a policy that was intentionally designed to discriminate on the basis of race and religion.

The second error arises, we submit, when the Government turns its attention to the actual claims asserted. Here the Government argues that implausibility is not a product of the context, but of the lack of specificity in the allegations of race-based or religion-based discrimination. In the Government's words, "But such bare-bones, conclusory allegations are insufficient to survive a motion to dismiss." *Id.*, at 32. In other words, something more specific is required to connect the dots between motive and action. That something more specific, regardless of how one describes it, can only be the product of a heightened pleading standard, a position this Court emphatically rejected in *Bell Atlantic*.[2] The Government's actual argument here is not one of implausibility but one of a failure to allege facts with sufficient factual or

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[2] The Government's insistence on a heightened pleading standard (in all but name) may, at least in part, be a product of the "conflicting signals" in the *Bell Atlantic* opinion, including the Court's somewhat ambiguous reference to "the line between the conclusory and the factual." 127 S.Ct. at 1966 n.5. But in our view, the true focus in *Bell Atlantic* was on drawing a line between the implausible and the plausible; in that context, where a claim might inherently be implausible, specificity operates functionally to move a claim from the former category to the latter.

evidentiary detail, a point that we explore in the next section.

* * *

In sum, *Bell Atlantic*'s use of the words "plausible" and "plausibility" did not signal any change in the traditional pleading standards embodied in Rule 8(a)(2). Rather, these words operate as descriptive terms used to illuminate established pleading standards pertaining to the adequacy of allegations, the permissible scope of inferences, and the requirements for stating a well-recognized claim for which relief can be granted. Moreover, plausibility, in any of these aspects, is not at issue in this case other than as an affirmation that Iqbal's complaint satisfies traditional pleading standards and, from a substantive perspective, "plausibly" states claims on which relief can be granted.

IV.
The Heightened-Pleading Standard Proposed by the Government is Inconsistent with Rules 8(a)(2) and 9 and with the Federal Rulemaking Process

In *Leatherman v. Tarrant County Narcotics Intelligence and Co-ordination Unit*, 504 U.S. 163 (1993), this Court defined a "heightened pleading standard" as "a more demanding rule for pleading a complaint" in a particular context than is generally required under Rule 8(a)(2). *Id.*, at 167. In applying this definition, the *Leatherman* Court concluded that

a judge-made "particularity" requirement in a § 1983 case was a heightened pleading standard and therefore inappropriate as a measure of pleading sufficiency under Rule 8(a)(2). *Id.*, at 168.

The Government, in its brief, says that it is not asking this Court to impose a heightened pleading standard. Brief for the Petitioners, at 28. But its brief belies that assertion. If one begins with the *Leatherman* Court's definition of a heightened pleading standard, *i.e.*, a standard that is more demanding than otherwise required by Rule 8(a)(2), that is precisely what the Government now seeks when it insists, time after time, on specific factual allegations pertaining to the motives of Ashcroft and Mueller. Indeed, the Government's argument begins with a description of "several principles that govern the resolution of this case." Brief for the Petitioners, at 15. The third of those principles is described as follows:

> [D]istrict courts *should* "insist" that a plaintiff "'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury" before allowing a suit "to survive a prediscovery motion for dismissal or summary judgment."

Id. (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)). (Emphasis added.) We note in passing that the Government's brief misstates and mischaracterizes both the principle and the decision in

Crawford-El.[3] But more significantly, the key (and obvious) point is that the Government begins its argument by insisting on a pleading standard that is "more demanding" than the general pleading standard of Rule 8(a)(2). Quite clearly, Rule 8(a)(2) does not require "specific factual allegations," a principle this Court has consistently reaffirmed, most recently

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[3] The Government's "third principle" misrepresents *Crawford-El* in two significant ways (both of which permeate the Government's brief). First, *Crawford-El* was not a pleading case, but one pertaining to the standard of proof on summary judgment. Moreover, the language quoted by the Government had nothing whatsoever to do with Rule 8(a)(2); rather, the Court was describing (by way of dicta) the pleading standard a district court *might* apply in ordering a reply under Rule 7(a) or a more definite statement under Rule 12(e). Second, although the Government uses the mandatory "should" to describe this pleading standard, the *Crawford-El* Court used permissive language – "the court may insist. . . ." *Id.*, at 598. Hence, the Government seeks to convert the Court's description of a discretionary judgment pertaining to what a district court *might* do under Rules 7(a) and 12(e) into a *mandatory* heightened pleading standard under Rule 8(a)(2).

The Government's reliance on *Crawford-El* is also somewhat peculiar given the *Crawford-El* Court's admonition:

> As we have noted, the Court of Appeals adopted a heightened proof standard in large part to reduce the availability of discovery in actions that require proof of motive. To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.

Id., at 595 (citing *Leatherman*, *supra*).

in *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (under Rule 8(a)(2) "[s]pecific facts are not necessary"), a case the Government buries in a footnote with no reference to the above-quoted language. Brief for the Petitioners, at 40-41 n.7.

The Government's insistence on a heightened pleading standard – accurately and fairly described as a "variable specificity" standard – permeates its brief. *See id.*, at 12, 15, 19, 20, 21, 27, 28, 31, 32, 33 & n.4, 36. This more demanding standard is, in the Government's view, "critical to promoting the policies underlying the qualified immunity defense," *id.*, at 21, and especially so in "the context of personal-capacity suits against high-ranking government officials," *id.*, at 27. Moreover, the need for specificity is said to be particularly acute in cases involving allegations of "unconstitutional motive." *Id.*, at 20. Finally, the Government argues for a variable standard of specificity that is keyed to both the context of the claim and the rank of the government official being sued. *Id.*, at 27, 33 n.4.

Regardless of how one assesses the Government's policy arguments, the invocation of those arguments in the context of a pleading controversy, coupled with the Government's focus on the need for specificity in a particular type of lawsuit, merely underscores the fact that the Government is seeking a more demanding pleading standard, which will be applied on an *ad hoc* basis and in disregard of the Federal Rules.

The Government's reference to claims involving "unconstitutional motive" is particularly telling since Rule 9(b) of the Federal Rules expressly provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." So not only is the Government asking this Court to alter the standards of Rule 8(a)(2), it is also asking the Court to ignore the text of Rule 9. The words of the *Leatherman* Court are directly relevant:

> [T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius.*

507 U.S., at 168. The case against a heightened pleading standard for "unconstitutional motive" is even stronger since Rule 9 specifically provides that such allegations "may be alleged generally."

In short, the Government asks this Court to ignore the Federal Rules, to disregard the carefully constructed rulemaking process, and to adopt a pleading standard – variable specificity – that this Court has consistently and unanimously rejected, most recently in 2007.

V.
The Qualified Immunity Defense Can be Fully Honored Within the Standards of the Federal Rules

Qualified immunity is a waivable defense, applicable in cases in which a government actor is alleged to have violated a plaintiff's constitutional rights. As a waivable defense, it is, unquestionably, the defendant's prerogative to raise it or not. Consistent with the foregoing, nothing in the Federal Rules suggests that the plaintiff bears any pleading burden in anticipation of that defense. Rather, under Rule 8(a)(2), the plaintiff's pleading burden in all cases is to provide a "short and plain statement of the *claim*" she wishes to assert. (Emphasis added.) It is logically and textually anomalous, therefore, to contend that the plaintiff's initial pleading burden somehow includes an obligation to anticipate a qualified immunity defense, much less to do so under a heightened pleading standard. Yet this appears to be the Government's contention.

On pages 16-19 of its brief, the Government describes the substantial policy considerations that animate the qualified immunity defense. We agree with much of what the Government says here, and particularly with the Government's assertion that the qualified immunity defense is designed to safeguard effective governance by ensuring government actors a reasonable range of discretion within the bounds of objective good faith. We agree too that once the qualified immunity defense is raised these policy concerns

require a federal court to assess the asserted defense at the earliest possible stage of the litigation.

We part company with the Government, however, when its argument tacitly moves from the policies that animate qualified immunity to the standards of pleading. The move is swift, but it comes at the cost of clarity. Brief for the Petitioners, at 19. Instead of addressing the qualified immunity defense in its particulars and then examining the role that pleading might play in the evaluation of that defense, the Government rests its argument on the abstraction of qualified immunity. It then treats the abstraction as a free-floating concept that permeates any case to which it might attach. In essence, the standards of pleading are virally infected by the concept, but not necessarily by the actual defense. As such, the Government's argument is not premised on the defense of qualified immunity, but on the raw idea of qualified immunity, untethered to any particular doctrine. Such an approach muddies the waters of both pleading standards and the actual doctrine of qualified immunity.

A more effective approach, in our view, begins with a careful description of the actual qualified immunity defense, and then proceeds to a determination of how that defense should or might be processed through the Federal Rules.

Qualified immunity shields a government actor from liability when she has acted under an objectively

good-faith belief that her conduct was within constitutional bounds. In the words of this Court:

> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.

Brosseau v. Haugen, 543 U.S. 194, 198 (2004). This is a carefully focused defense, keyed to a government actor's objective good faith. Thus, while qualified immunity is properly described as a "defense against suit," it is not a generalized policy against suit. Rather, it is a waivable defense tied exclusively to the question of objective good faith.

In *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001), this Court instructed lower courts to approach the question of qualified immunity through a two-step process, asking, first, whether the plaintiff has stated a legally recognized claim for the violation of a federal right, and, second, whether the right in question was one that was "clearly established" at the time of the challenged conduct. This "two-step" formulation is being reconsidered by this Court during the present term, *see Pearson v. Callahan*, 128 S.Ct. 1702 (2008) (*certiorari* granted), but whether or not the Court decides to change or modify the required approach, what is now described as the first step is, in fact, only a reflection of the plaintiff's standard obligation to show her entitlement to relief under Rule 8(a)(2). As a matter of trans-substantive procedural law, a failure to make such a showing in any case would

trigger a Rule 12(b)(6) motion to dismiss for failure to state a claim. No different rule applies to constitutional claims, for nothing in this Court's qualified immunity jurisprudence suggests that the first element should be accorded any specialized treatment or scrutiny. Indeed, in determining whether the plaintiff has stated a recognized constitutional claim, the Court has adopted the standard view under Rule 12(b)(6) that the allegations in the complaint must be viewed in a "light most favorable" to the plaintiff. *Saucier*, 533 U.S., at 201. There is not a hint of a requirement of factual specificity.

The second step, *i.e.*, the question of whether the claimed violation was clearly established at the time of the challenged incident, *is* the qualified immunity defense. It presents a question unique to that defense and one that is completely dispositive of the defense. More to the point, the second step is especially designed to determine the question of the defendant's objective good faith and, thereby, to promote the policies of effective governance by limiting a government actor's liability to those constitutional violations that could have been reasonably known at the time of the incident. Resolving these intermingled questions of objective good faith and clearly established law, however, has nothing to do with pleading. While the plaintiff does bear the burden of persuasion on this issue, the burden here will be met, if at all, by reference to legal arguments premised entirely on the substantive content of constitutional law as established at the time of the challenged incident.

That is the qualified immunity defense. What the Court described in *Saucier* as the "second step" presents a unique law-driven inquiry pertaining to objective good faith. And as this Court has admonished, once raised, the defense must be resolved at the earliest possible phase of the litigation. But this does not mean that the district court must dispose of the case as quickly as possible in derogation of the Federal Rules. Rather, it means that the district court must process the defense as quickly as possible under the guidance of the Federal Rules, unaltered and undiminished by *ad hoc* policy judgments pertaining to specific types of cases or particular types of issues.

Most importantly, a United States District Court, operating within the Federal Rules, has ample authority to promote the policies underlying the qualified immunity defense, including the policy of an early resolution, through a careful and sensitive management of those cases in which the defense has been raised. *See Crawford-El v. Britton*, *supra*, 523 U.S., at 597-600. Among the vast array of possibilities, a district court may grant a motion for a more definite statement under Rule 12(e). This might occur if the allegations were such that the actual contours of the constitutional claim cannot be ascertained. *Id.*, at 598. Similarly, Rule 7(a)(7) empowers the district court to order a reply to an answer, and if the answer includes a qualified immunity defense, the court may direct the plaintiff to respond to that defense in the reply for reasons similar to those that might trigger a Rule 12(e) order. *Id.* Next, the district court has

"broad discretion to tailor discovery narrowly and to dictate the sequence of discovery," and may do so in the particular context of a qualified immunity defense. *Id.* That is not to say that the district court can order discovery on a claim that is just "shy of a plausible entitlement to relief," *Bell Atlantic*, *supra*, 127 S.Ct., at 1966. Rather it is to say that a plausible claim, which exists here, does not automatically open the door to the full range of discovery. In addition, having ordered limited discovery, the district court can accelerate the litigation process toward an early consideration of summary judgment under Rule 56. Finally, and more generally, the district court can exercise its full range of managerial skills toward a quick, but fair resolution of the qualified immunity defense, always keeping in mind that the defense pertains to objective good faith and should not be confused with a decision on the merits of the plaintiff's claim.

Nothing in the Government's brief suggests that district courts are incapable of exercising their power and discretion under the Federal Rules in a manner that fully comports with the policies underlying the qualified immunity defense. While the Government correctly observes that the qualified immunity defense must be decided in an expeditious manner, Brief for the Petitioner, at 17-18, it seems to be arguing that the defense should be decided in a precipitous, on-the-face-of-the-complaint manner without reference to the standards of practice under the Federal Rules. That position is untenable and well

beyond the scope of the qualified immunity defense as presently understood by bench and bar.

Significantly, the Second Circuit took pains to instruct the district court to be attentive to the qualified immunity defense on remand. In that court's words:

> We note that Rule 8(a)'s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but "*must* exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El,* 523 U.S. at 597-98, 118 S.Ct. 1584 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that certain of the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place. *See Harlow,* 457 U.S. at 821, 102 S.Ct. 2727 (Brennan, J., concurring) ("[S]ummary

> judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred."). We give these matters additional consideration below with respect to particular claims.

Iqbal v. Hasty, *supra*, 490 F.3d, at 159.

In our view, this careful and demanding approach reflects an appropriate balance that comports with the Federal Rules and, at the same time, fully honors the important policies at the heart of the qualified immunity defense. The approach suggested by the Government, we submit, alters the contours of the qualified immunity defense and transforms that defense into a right to an immediate judgment on the merits without adherence to the procedural standards and protections carefully crafted in the Federal Rules. The system for reconsidering and amending those rules – a system designed to guarantee full and careful consideration and debate, as well as legislative oversight – should not be circumvented.

CONCLUSION

In sum, we urge this Court to resist the Government's invitation to impose a heightened pleading requirement in lawsuits in which a high-level government official has been sued for an alleged violation of the plaintiff's clearly established constitutional rights. The invitation comes at the cost of

clarity both to long-accepted pleading standards and to the specifically defined elements of the qualified immunity defense.

The judgment below should therefore be affirmed.

Respectfully submitted,

ALLAN IDES
Counsel of Record
919 Albany Street
Los Angeles, CA 90015
(213) 736-1464

DAVID L. SHAPIRO
1565 Massachusetts Avenue
Cambridge, MA 02138

Attorneys for Amici Curiae

APPENDIX A

List of Amici Curiae*

Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania Law School

Richard D. Freer, Robert Howell Hall Professor of Law, Emory University School of Law

Helen Hershkoff, Anne and Joel Ehrenkranz Professor of Law, New York University School of Law

Allan Ides, Christopher N. May Professor of Law, Loyola Law School, Los Angeles

Judith Resnik, Arthur Liman Professor of Law, Yale Law School

David L. Shapiro, William Nelson Cromwell Professor of Law, Emeritus, Harvard Law School

Suzanna Sherry, Herman O. Loewenstein Professor of Law, Vanderbilt University Law School

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* Law school affiliations are stated for identification only.

AMICUS CURIAE BRIEF

No. 07-1015

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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*, The Sikh Coalition, American-Arab Anti-Discrimination Committee, Discrimination and National Security Initiative, Muslim Public Affairs Council, Sikh American Legal Defense and Education Fund, Sikh Council on Religion and Education, South Asian Americans Leading Together and United Sikhs in SUPPORT OF RESPONDENT IQBAL

DAWINDER S. SIDHU
1717 Massachusettes Avenue
Suite 101
Washington, DC 20009
(202) 297-1046

BRIAN E. ROBINSON*
AMARDEEP SINGH BHALLA
THE SIKH COALITION
40 Exchange Place
Suite 728
New York, NY 10005
(212) 655-3095

* *Counsel of Record*

Attorneys for Amici Curiae

QUESTION PRESENTED

Amici will address the following question:

Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

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INTERESTS OF *AMICI CURIAE*[1]

In the immediate aftermath of the September 11, 2001, attacks, Muslims and those perceived to be Muslim were murdered, assaulted, harassed, and subject to other discriminatory conduct. *Amici* are organizations that have responded to such discrimination on behalf of Muslims, Arabs, South Asians, and Sikhs. Since 9/11, *amici* have led various efforts to safeguard the rights of these communities and to vindicate their rights when abridged.

In important respects, this case concerns the "September 11, 2001 context." *Amici* assert that a meaningful appreciation of that context requires an understanding of the extensive private and public backlash against Muslims and others following 9/11. *Amici* also contend that the post-9/11 climate itself must be placed in the larger context of the government's ongoing struggle to balance security and liberty in times of war. This case also implicates the proper relationship between religious liberty and government action, which must be taken into account as well. *Amici* are concerned that, without a broader factual and historical view of the case, proper consideration may not be afforded to Respondent Javaid Iqbal's allegations of mistreatment on the basis of his race and religion.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

Amici, mindful of Supreme Court Rule 37.1, submit that its unique interest in post-9/11 discrimination and relevant historical themes will enrich the Court's perspective on the disputed issues and will thus aid in the Court's decisional process.

* * *

The Sikh Coalition was founded on September 11, 2001, to 1) defend civil rights and liberties for all people; 2) promote community empowerment and civic engagement within the Sikh community; 3) create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination; and 4) educate the broader community about Sikhism in order to promote cultural understanding and create bridges across communities.

The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC, which is non-sectarian and non-partisan, is the largest Arab-American grassroots civil rights organization in the United States. Founded in 1980 by former United States Senator James Abourezk, ADC is at the forefront in addressing discrimination and bias against Arab-Americans.

The Discrimination and National Security Initiative (DNSI) is a non-profit organization established in 2004. DNSI's purpose is to research the mistreatment of minority communities in times of war and in particular to study the human consequences of post-9/11 discrimination.

The Muslim Public Affairs Council (MPAC) is a public service agency working for the civil rights of American Muslims, for the integration of Islam into

American pluralism, and for a positive, constructive relationship between American Muslims and their elected representatives. MPAC was created in 1988 to promote a vibrant American Muslim community and to enrich American society through exemplifying the Islamic values of Mercy, Justice, Peace, Human Dignity, Freedom, and Equality for all.

South Asian Americans Leading Together (SAALT) is a national, non-profit, non-partisan organization dedicated to fostering civic and political engagement by South Asians in the United States through a social justice framework that includes policy analysis and advocacy, community education, and leadership development.

The Sikh American Legal Defense and Education Fund (SALDEF) is the oldest and largest Sikh American civil rights and advocacy organization in the United States. SALDEF's mission is to protect the civil rights of Sikh Americans through legal assistance, legislative advocacy, educational outreach, and media advocacy.

The Sikh Council on Religion and Education is a faith-based non-profit organization dedicated to creating awareness of the Sikh religion and the Sikh people in the United States and around the world, and to promoting the values of justice, equality and brotherhood inherent in the Sikh religion. It aims to provide a platform for interfaith dialogue to create a peaceful coexistence of all faiths.

United Sikhs is a UN-DPI-affiliated, international non-profit, non-governmental, humanitarian relief, human and civil rights advocacy organization, aimed at empowering those in need, especially disadvantaged and minority communities across the world.

STATEMENT OF THE CASE

1. On September 11, 2001, nineteen Muslim men, aged 20-38, used hijacked commercial airplanes to attack the World Trade Center in New York and the Pentagon in Virginia. "Americans will never forget the devastation wrought by these acts." *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006). One subset of individuals in America – those sharing characteristics with those responsible for 9/11 – were subject to an immediate and widespread backlash initiated by private and public actors.

An aspect of the public response to the attacks was the government's mass preventative detention of over one thousand individuals. The Department of Justice, Office of the Inspector General, reviewed the cases of 762 of the "September 11 detainees." *See* Office of the Inspector General, U.S. Dep't of Justice, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (Apr. 2003) (OIG Report). The report found that the detainees were "almost exclusively men," most were between 26 and 40 years of age, and most were of Pakistani origin. *Id.* at 20-21. The report determined that, in New York, the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service (INS) "made little effort" to differentiate between those detainees tied to terrorism and those encountered by chance. *See id.* at 69. Similarly, it noted that the process of ascertaining which detainees were persons of "high interest" was both inconsistent and imprecise. *See id.* at 158. The report noted that the September 11 detainees' conditions of confinement in the Metropolitan Detention Center (MDC) raise "serious

questions" regarding the treatment of those detainees. *Id.*

2. On November 2, 2001, Respondent Javaid Iqbal – a Muslim male, and native and citizen of Pakistan – was arrested in New York by FBI and INS agents. *See* Compl. at¶80. He was arrested on charges related to identity theft. *See Elmaghraby v. Ashcroft*, No. 04-1409, 2005 WL 2375202, at *1 n.1 (E.D.N.Y. Sept. 27, 2005) (Respondent Iqbal was charged with violating 18 U.S.C. §§ 371 & 1028 (conspiracy to defraud the United States and fraud with identification)). He pleaded guilty.

Respondent Iqbal alleges that, on or around November 5, 2001, he was brought to the MDC in Brooklyn and housed in its general population unit. *See* Compl. at¶81. He further alleges that he was subsequently designated to be a person of "high interest" and, as a result, on or around January 8, 2002, was housed in MDC's Administrative Maximum ("ADMAX") Special Housing Unit ("SHU") – a unit created after 9/11 to hold post-September 11 detainees. *See id.* at¶¶51, 81. Respondent Iqbal contends that ADMAX SHU detainees were subject "to highly restrictive conditions of confinement" that were "[m]arkedly different from the conditions in the MDC's general population[.]" *Id.* at ¶¶60, 63.

3. Respondent Iqbal filed suit against Petitioners and others,[2] generally challenging his

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[2] The remaining defendants are: Michael Rolince, Former Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division; Kenneth Maxwell, Former Assistant Special Agent in Charge, New York Field Office, FBI; Kathleen Hawk Sawyer, former Director of the Bureau of Prisons (BOP); David Rardin, Former Director of the Northeast Region of the BOP; Michael Cooksey, Former Assistant Director

classification as a person of "high interest" and the permissibility of the harsher conditions of confinement he experienced as a result. *See id.* at ¶¶1-2.[3] Respondent Iqbal argues that he was designated to be a person of "high interest" and thereafter sent to the ADMAX SHU solely because of his race, religion, and national origin – not because of any tie to terrorism or for any other legitimate penological purpose. *See id.* at ¶¶3, 52, 96.

The complaint presses twenty-one constitutional and statutory claims. In relevant part, the complaint asserts, pursuant to *Bivens*,[4] that Petitioners violated the First Amendment by subjecting Respondent Iqbal to harsher conditions of confinement because of his religious beliefs (claim 11), and the equal protection guarantee of the Fifth Amendment by subjecting him to harsher conditions of confinement because of his race (claim 12). *See* Compl. at ¶¶204-206, 231-36.[5]

4. Prior to discovery, Petitioners and other defendants moved to dismiss the complaint, contending that qualified immunity shielded them from liability and specifically that the allegations in the complaint were insufficient to overcome the qualified immunity defense. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957) (under Rule 8(a)(2) of the

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for Correctional Programs of the BOP; former and current Wardens of the MDC; and certain MDC officers and personnel.

[3] Respondent Iqbal filed suit with Ehad Elmaghraby, a Muslim male. The United States settled Elmaghraby's claims for $300,000. Therefore, Respondent Iqbal remains the only plaintiff in this action.

[4] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[5] In consideration of Supreme Court Rule 37.1 and *amici's* statement of interest, this brief will focus on these claims of discrimination.

Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" such that the defendant has "fair notice of what the plaintiff's claim is and the grounds upon which it rests."). The U.S. District Court for the Eastern District of New York noted that dismissal of a complaint is appropriate under Rule 8(a) if, taking the factual allegations as true, it is clear that no set of facts would entitle the plaintiff to relief. *See Elmaghraby*, 2005 WL 2375202, at *9. Applying this standard, the district court denied the motion as to the *Bivens* claims against Petitioners. *See id.* at *35.

The district court observed that "our nation's unique and complex law enforcement and security challenges in the wake of the September 11, 2001 attacks do not warrant the elimination of remedies for the constitutional violations alleged here." *Id.*; *see id.* at *18 ("the proposition . . . that, as a matter of law, constitutional and statutory rights must be suspended during times of crisis, is supported neither by statute nor the Constitution."). The court further stated that while context is relevant to a qualified immunity determination, "the qualified immunity standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability[.]" *Id.* at *14. And, while the Attorney General "may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution," he "*should* be made to hesitate[.]" *Id.* (emphasis in original; quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

In addition, the district court stated that "the post-September 11 context provides support for plaintiffs' assertions that defendants were involved

in creating and/or implementing the detention policy under which plaintiffs were confined[.]" *Id.* at *20. According to the district court, the OIG Report "suggests the involvement of [Petitioners] in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities." *Id.* at *20 n.20 (citing OIG Report at 37-38, 39, 42, 49, 60 112-13, 116).

5. Petitioners and others filed an interlocutory appeal, objecting to the district court's ruling on the motion to dismiss. The U.S. Court of Appeals for the Second Circuit noted that a Supreme Court opinion issued after the district court's decision, *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), generated uncertainty regarding the pleading standard applicable under Rule 8(a). *See Iqbal v. Hasty*, 490 F.3d 143, 155 (2nd Cir. 2007). According to the Second Circuit, *Twombly* did not institute a heightened pleading standard, but rather clarified the meaning of the pleading requirements – dispensing with the "no set of facts" rubric, a pleader is instead obligated "to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* at 157-58 (emphasis in original). With this understanding of the pleading requirements and upon accepting the allegations in the complaint as true for purposes of the motion to dismiss, the Second Circuit affirmed, except with respect to a procedural due process claim.

The Second Circuit remarked that the defendants' arguments regarding qualified immunity were permeated by the contention that "the immediate aftermath of the 9/11 attack created a context in which the defense must be assessed

differently and, from their standpoint, favorably." *Id.* at 151. The circuit court maintained, however, that "most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances" and that "[t]he strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Id.* at 159. Indeed, the right "not to be subjected to ethnic or religious discrimination [was] clearly established prior to 9/11, and . . . remain[s] clearly established even in the aftermath of that horrific event." *Id.* at 160.

Moreover, the Second Circuit held that "it is plausible" to believe that Petitioners "would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies." *Id.* at 166. As to the claims of discrimination, the Second Circuit noted that the "allegation that [Petitioners] condoned and agreed to the discrimination . . . satisfies the plausibility standard" of Rule 8(a) "because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." *Id.* at 175-76.

Judge Cabranes filed a concurring opinion in which he expressed fear that this case would lead to more suits from those aggrieved by national security programs and doubted whether district judges could manage discovery in such cases. *Id.* at 179.

6. On June 16, 2008, this Court granted certiorari.

SUMMARY OF ARGUMENT

Respondent Javaid Iqbal – a Muslim male, arrested in New York after the attacks of September 11, 2001 – alleges that he was subjected to harsher conditions of confinement solely because of his race, religion, and national origin. *Amici* contend that this case cannot be examined in isolation or only against the backdrop of the attacks. Context matters, and in this case that context is multi-faceted. In particular, this case implicates the Nation's historical tradition of respecting an individual's religious beliefs or affiliation, the historical use of personal characteristics as a proxy for suspicion in times of war, and the Nation's overall treatment of Muslims and those perceived to be Muslim in the aftermath of 9/11.

Amici assert that an appreciation for these broader historical and factual perspectives is required in order for proper consideration to be given to the allegations and legal conclusions under review. *Amici* argue that these perspectives support the Second Circuit's ruling with respect to Respondent Iqbal's claims of discrimination.

A. The Framers, fresh from their experience with religious persecution, espoused the view that the individual conscience and its religious elements were beyond the reach of the government. At the same time, they recognized that an individual's actions, even if they were consistent with an individual's religious views, were amenable to government regulation. According to the Framers, the courts were to serve as an independent check on state action that allegedly interfered with an individual's religious liberty. This judicial function is enhanced in times of war.

In light of these guiding principles, Respondent Iqbal may not be punished – placed in a prison environment containing harsher conditions of confinement – because of his religious beliefs or affiliation alone. His conduct, committing identify theft, is not in any way related to the terrorist attacks or to the specter of future acts of terrorism, and no evidence has been presented to the contrary. Therefore, it does not seem that his actions were the justification for his classification as a person of "high interest" or for his placement into a prison unit specifically created for "September 11 detainees."

Amici are concerned that Respondent Iqbal's Muslim faith was the sole reason for his segregation from the general prison population and subsequent placement into harsher conditions of confinement. This concern is wholly consistent with the OIG Report, which: found that the FBI and INS agents made little attempt to distinguish between those detainees that presented a security risk and those that happened to be encountered coincidentally; questioned the criteria used to designate a detainee a person of "high interest;" and determined that the process used for such classifications was inconsistent and imprecise. *See* OIG Report, at 20, 69, 158, 196.

Amici therefore argue that the district court should be permitted to perform its essential role of reviewing whether Respondent Iqbal was punished by the government because of his Muslim faith.

B. If Respondent Iqbal was segregated and placed into a harsher prison unit solely because of his religion, the question becomes whether national security interests sanitize such government action. *Amici* assert that the Nation's history reveals that this action is clearly impermissible even in wartime.

During World War II, the government interned over 100,000 individuals of Japanese descent in America. The Court, deferring to the government's claims of military necessity and in recognition of the fact that the Nation was in conflict with the Japanese Empire, upheld the executive order giving rise to the internment. *See Korematsu v. United States*, 323 U.S. 214 (1944). Justice Robert H. Jackson dissented, arguing that the Court had validated a principle of racial discrimination that "lies about like a loaded weapon" available to any authority claiming that national security demands urgent discriminatory action. *Id.* at 246.

It is that same loaded weapon that the government has attempted to wield in this case. Just as the government after Pearl Harbor used Japanese ancestry as a proxy for suspicion or disloyalty, *amici* are concerned that the government after 9/11 has used the Muslim religion as a proxy for those same unsavory qualities – a technique that is clearly wrong in light of Justice Jackson's opinion. Accordingly, *amici* disagree with Petitioners that it was "sensible" to treat individuals who shared the hijackers' religion in this fashion. For the same reason, *amici* disagree with Petitioners' assertion that Respondent Iqbal's allegation that he was classified as a security risk solely because of his religion is insufficient to state a claim.

Justice Jackson also expressed his disappointment that the Court was used as an instrument to bring a discriminatory wartime doctrine within the bounds of the Constitution. Petitioners are asking the Court to believe that the "September 11 context" excuses wholesale discrimination and thereby insulates them from allegations of discriminatory treatment. The

Constitution should not be read to encompass this proposition.

Amici argue that that national security interests do not justify the blanket placement of Muslim detainees into harsher conditions of confinement.

C. Petitioners contend that even if discriminatory conduct took place with respect to Respondent Iqbal and Muslims in the ADMAX SHU, they did not have personal knowledge of such conduct. The extensive public backlash against Muslims and those perceived to be Muslim, however, belies any suggestion that Petitioners were unaware of the mistreatment of Muslims, including Respondent Iqbal, in the ADMAX SHU.

In the aftermath of 9/11, the government engaged in a number of investigative and security measures that targeted individuals on the basis of their race, religion, and/or national origin. For example, Muslims and others encountered heightened airport screening, were prohibited from boarding their flights, and were ejected from planes because of how they looked. The government also initiated several wide-ranging immigration programs that rounded up thousands of Muslims in the hopes that terrorists would be among those caught in the government's wide-net. In addition, the government led a campaign of mass preventative detention, in which over one thousand individuals were detained.

Respondent Iqbal's allegations that he was segregated from the general prison population and assigned to the ADMAX SHU as a result of his race, religion, or national origin are consistent with the government's other post-9/11 security responses, which targeted Muslims irrespective of whether they were linked to terrorism. It also supports the Second

Circuit's conclusions that it is plausible that Petitioners affirmatively approved, condoned, or knew of, the detention of Muslims, including Respondent Iqbal, in a prison unit created specifically after 9/11. The notion that Respondent Iqbal was targeted as a result of his race, religion, or national origin is supported by the OIG Report, which commented on the arbitrary manner in which individuals were detained and then selected by federal agents for inclusion in the ADMAX SHU.

Amici argue that the post-9/11 backlash, taken as a whole, suggests that Petitioners had personal knowledge of the treatment of the September 11 detainees in the ADMAX SHU.

In conclusion, *amici* respectfully submit that the Court of Appeals' ruling with respect to Respondent Iqbal's claims of discrimination should be affirmed.

ARGUMENT

BROADER HISTORICAL AND FACTUAL CONTEXTS SUPPORT AFFIRMANCE OF THE COURT OF APPEALS' RULING

This case concerns whether Petitioners may be held personally responsible, under *Bivens*, for segregating Respondent Iqbal – a Muslim male arrested in New York in the wake of 9/11 – and subjecting him to harsher conditions of confinement because of his race, religion, or national origin. This case therefore implicates the Nation's historical tradition of safeguarding religious liberty, the historical use of personal characteristics as a proxy for suspicion in times of war, and the Nation's overall treatment of Muslims and those perceived to be

Muslim in the aftermath of 9/11. *Amici* contend that this case cannot be viewed on its own or only in the post-9/11 context – it is another episode in the Nation's ongoing and maturing endeavor to provide security while safeguarding liberty. In this sense, *amici* argue that broader historical and factual contexts are required to properly examine the allegations and legal conclusions now under review. As explained below, a more comprehensive perspective of the case cuts in favor of affirming the Second Circuit's opinion with respect to Respondent's claims of discrimination.

A. The Historical Importance of Religious Liberty in the United States Highlights the Need for Judicial Review

A foundation of the American Republic is that the individual may freely practice his religion without government interference. *See Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam) ("religious worship both in method and belief must be strictly protected from government intervention."); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1830 (2004) (describing the American concept of religious liberty as a "negative liberty," that is "a sphere of private activity to be protected from state interference[.]"). This fundamental view regarding the appropriate relationship between the individual and the State was enshrined in the First Amendment, which provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST., AMDT. 1.

The Framers found it necessary to include this provision in the Constitution because of their experiences with religious persecution. *See Bowen v. Roy*, 476 U.S. 693, 703 (1986) (it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause."); *Douglas v. Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring in result) ("the First Amendment separately mention[s] free exercise of religion" because of "[t]he history of religious persecution[.]"). Accordingly, the Framers placed the individual conscience, including its religious dimensions if any, beyond the reach of government control or coercion. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1 963) ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the . . . inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel[.]"); *Schneider v. Smith*, 390 U.S. 17, 25 (1968) (noting that the First Amendment "creates a preserve where the views of the individual are made inviolate.").

As a result, the government generally cannot penalize (or reward) individuals on the basis of religious belief or affiliation alone. *See Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them."). Instead, the Framers contended that it is only the individual's conduct – not the religious content of his mind – that the government may touch. *See Schneider*, 390 U.S. at 25 (quoting Thomas Jefferson as saying, "[t]he opinions of men are not the object of civil government, nor under its jurisdiction[.] [I]t is time

enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order[.]") (internal quotation marks and citation omitted); Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* Michael W. McConnell, *et al.*, Religion and the Constitution, 54-55 (2002) ("religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions[.]"). In short, the freedom of religion, however revered in our constitutional tradition, is not absolute – while "legislative power over mere opinion is forbidden," such power "may reach people's actions when they are found to be in violation of important social duties or subversive of good order" even if the actions are consistent with the people's religious convictions. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

The Framers also recognized that the courts were to serve as a check on government activity implicating religious liberty. *See Davis v. Passman*, 442 U.S. 228, 241-42 (1979) (quoting James Madison as saying, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of [the Bill of Rights]; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.") (citation omitted); *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) ("Our Founders conceived of a Republic receptive to voluntary religious expression, and provided for the possibility

of judicial intervention when government action threatens or impedes such expression."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1445 n.186 (1990) (noting, with respect to the free exercise clause, that, "[t]he evidence is overwhelming that [the] framers and ratifiers understood and intended the courts to engage in constitutional judicial review."). This is especially so in times of war. *See* National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report, p. 394 (2004) (a "shift of power and authority to the government [after 9/11] calls for an *enhanced* system of checks and balances to protect the precious liberties that are vital to our way of life.") (emphasis added).

In consideration of these guiding principles, *amici* argue that Respondent Iqbal may not be punished – classified as a person of "high interest" and thereafter subjected to harsher conditions of confinement – on the basis of his subscription to a certain religious belief system, or the perception that he did so subscribe. Further, while other individuals invoked Islam to justify their socially-disruptive behavior, Respondent's actions – committing identity theft – were wholly unrelated to 9/11 or any religious-based conduct that upset the social order.[6]

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[6] Absent from Petitioners' opening brief is any indication that Respondent's conduct was in any way related to 9/11 or the preparation of an additional attack. *Amici* anticipate that Petitioners may, in their reply brief, attempt to make such a connection that is based on Respondent's actions rather than his membership to a particular faith. Any attempts made for the first time in Petitioners' reply should be viewed with skepticism if not ignored entirely. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 895 (1988)

Amici are concerned that it was Respondent's faith alone that served as the basis for his classification and subsequent detention in the ADMAX SHU.

This concern is wholly consistent with the OIG's findings, which suggest that Muslims in New York, such as Respondent Iqbal, were not only swept up by federal authorities, but then categorically sent to the ADMAX SHU irrespective of any link to terrorism. *See* OIG Report, at 69 (the FBI and INS "made little attempt" to distinguish between detainees linked to the attacks or to terrorism, and "those encountered coincidentally."); *id.* at 158 ("we question the criteria (or lack thereof) the FBI used to make its initial designation of the potential danger posed by September 11 detainees."); *id.* ("there was little consistency or precision to the process that resulted in detainees being labeled 'high interest,' 'of interest,' or 'of undetermined interest.'"); *id.* at 196 ("we believe the FBI should have exercised more care in the classification process[.]"); *id.* at 20 (an Assistant U.S. Attorney from the Southern District of New York "who worked on the terrorism investigation" recalled that he was "frustrated that the BOP did not distinguish between detainees who, in his view, posed a security risk" and those who were "uninvolved witnesses.").

Amici respectfully urge the Court to allow the district court to perform its essential role of reviewing whether Respondent Iqbal was punished on the basis of his religion.

("argument[s] not presented to the courts below . . . will not be considered here.").

B. The Nation's Historical Struggles with Liberty and Security Suggest that the Government's Actions are Legally Problematic

If Respondent's classification and assignment to the ADMAX SHU were premised not on his actions, but instead on his actual or perceived adherence to a certain belief system, the question becomes whether the government may, on the basis of a religion alone, segregate detainees and place them into harsher conditions of confinement for national security purposes.[7] *Amici* contend that the answer is plain that the government cannot. The Nation's past experiences with the wartime treatment of individuals sharing characteristics with the true enemy help reveal that answer.

During World War II, over 100,000 individuals of Japanese descent in the West Coast of the United States were brought from their homes to internment camps. In *Korematsu*, the Court deferred to the government's arguments regarding the military necessity of the relocation and upheld the constitutionality of the executive order giving rise to the internment. The Court noted that the petitioner was interned not because of any racial animus towards the Japanese, but

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[7] It appears that the government's identification of Respondent's religion accounted for his classification and detention in the ADMAX SHU. If, however, the reason for the segregation was the safety of the Muslim detainees, or some related penalogical purpose, this would not explain why the ADMAX SHU would contain harsher conditions than the general population. *See* Compl. at ¶¶61, 63.

> because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily[.]

Id. at 223.[8] In dissent, Justice Jackson forewarned that the majority had validated a principle of racial discrimination that

> lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." [I]f [the courts] review and approve, that passing incident becomes the doctrine of the Constitution. There

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[8] Similarly, in upholding an American citizen of Japanese ancestry's conviction for violating the exclusion order and curfew requirements imposed after the attack on Pearl Harbor, the Court observed, "[w]e cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry." *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943).

> it has a generative power of its own, and all that it creates will be in its own image.

Id. at 246 (footnote omitted). It is that same loaded weapon that the government has attempted to wield in the post-9/11 context and in this case specifically. *See* Elbert Lin, *Korematsu Continued* . . . , 112 YALE L.J. 1911, 1913-17 (2003) (suggesting that *Korematsu* has been "revived" after 9/11, even though features of 9/11 do not duplicate each aspect of the internment); *see also* Eric Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 592 (2002) ("Justice Jackson's instruction from sixty years ago must guide our steps today."). The government may not have exhibited overt racial hostility towards Islam or Muslims. But it has invoked national security to justify the segregation and harsher treatment of Muslims detained in the New York area despite the absence of any evidence that Respondent Iqbal, a Muslim, was disloyal to the United States. Justice Jackson was troubled by the use of race as a proxy for disloyalty in times of national emergency – *amici* possess the identical concern in this case.

As a result, *amici* disagree with Petitioners that, because "[t]he 19 hijackers were from Arab nations and believed to be Islamic fundamentalists," it was "sensible" for the government to focus on individuals with "the same radical ideology as the attackers[.]" Pet. Br. at 34.[9] For the same reason,

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[9] Even so, Islam cannot be equated with the "same radical ideology" advanced by perpetrators of the attacks. *See generally* "Islam is Peace" Says President, Remarks by the President at Islamic Center of Washington, D.C., Sept. 17,

amici dispute Petitioners' argument that "the bare allegation that those deemed to be 'of high interest' to the September 11 investigation were Arab or Muslim men is insufficient on its own to suggest illegal conduct." *Id.* at 35. The reprehensibility of *Korematsu* itself indicates that the government's segregation of Muslim men into a harsher penal environment, without any evidence of disloyalty, is imprudent, impermissible, and a clearly established wrong.[10]

Justice Jackson was also uncomfortable with the use of the courts as an instrument to validate the government's discriminatory wartime actions. In reflecting on *Korematsu*, he wrote that the executive order under consideration "was an unconstitutional one which the Court should not bring within the Constitution by any doctrine of necessity, a doctrine too useful as a precedent." Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 116 (1951). Here, Petitioners have asked the Court to believe that national security interests justify the gathering of Muslim men from the general prison population and their placement into harsher conditions of confinement irrespective of their actions or allegiance to the Nation.[11] The Court

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2001, available at: http://www.whitehouse.gov/news/releases/2001/09/20010917-11.html.

[10] For example, in the Civil Liberties Act of 1988, 50 U.S.C. § 1989, *et seq.*, "Congress recognize[d] that . . . a grave injustice was done to both citizens and permanent residents of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II" and that these actions "were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."

[11] It cannot be argued that, by breaking the law with respect to identity theft, that Respondent Iqbal has thereby demonstrated his disloyalty. There is a difference between

should not accept Petitioners' invitation to conform the Constitution to encompass this contention or to convert wholesale religious discrimination into a legitimate investigative technique or preventative measure.[12] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty[.]").

Amici appreciate the difficult circumstances that the Nation found itself in following the terrorist attacks and the awesome responsibility that the American law enforcement community assumed in its aftermath. Those circumstances, however, do not justify constitutional violations. *See* OIG Report at 164 ("While the chaotic situation and the uncertainties surrounding the detainees' role in the September 11 attacks and the potential for additional terrorism explain some of [the identified] problems, they do not explain or justify all of them."). *Amici* are therefore mindful of Justice Jackson's warning that the courts should not be tempted to excessively defer to the banner of national security. *See* Jackson, 1 BUFF. L. REV. at 116 ("It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often

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engaging in some behavior that falls outside of the limits of the law and intending to engage in specific behavior of a treasonous or terrorist sort.

[12] *Amici* agree with Petitioners that the government's conduct should not be viewed "with the 20/20 vision of hindsight." Pet. Br. at 34 n.5 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). But in light of the lessons of *Korematsu*, *amici* contend that 20/20 hindsight is not required to ascertain the wrongfulness of segregating detainees on the basis of religion for harsher treatment – the impermissibility of such segregation was apparent at the time of the government's conduct.

in answer to exaggerated claims of security."). Accordingly, *amici* urge the Court to reject the argument that the national security interests in this case justify the blanket placement of Muslim detainees into harsher conditions of confinement. *See* 9/11 Commission Report, at p. 395 ("Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.").

C. The Extent of the Post-9/11 Backlash Belies Petitioners' Alleged Lack of Personal Knowledge of the Detainees' Classification or Treatment

Within minutes of the 9/11 attacks, Muslims and those perceived to be Muslim in the United States were targeted on the basis of their appearance.[13] Within one week, over six-hundred hate crimes were directed against Muslims, Arabs, South Asians, and Sikhs. *See* South Asian American Leaders of Tomorrow, American Backlash: Terrorists Bring War Home in More Ways Than One, 3 (2001), available at: http://www.saalt.org/attachments/1/American%20Backlash%20report.pdf. Within eight weeks, nineteen individuals from these groups had been murdered, while hundreds of others had been stabbed, assaulted, harassed, terminated from their employment, or denied access to restaurants and similar locations – all in response to 9/11. *See, e.g.,*

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[13] For example, on 9/11, after the second plane hit the World Trade Center, a Sikh was chased in lower Manhattan by three men and ultimately took his turban off in order to avoid further harassment. *See* Somini Sengupta, Arabs and Muslims Steer Through an Unsettling Scrutiny, N.Y. TIMES, Sept. 13, 2001.

Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265-77 (2004). According to one report, "anti-Muslim hate crimes in the United States rose 1700% during 2001." Human Rights Watch, 'We Are Not the Enemy': Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim After September 11, Nov. 14, 2002, available at: http://www.hrw.org/press/2002/11/usahate.htm. This invidious behavior has persisted – over seven years after the attacks, members of these communities continue to encounter discriminatory conduct in various settings, including schools and places of public accommodation. *See, e.g.*, Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-9/11 Challenges to this Article of Faith*, 9 Rutgers J. L. & Religion 10, 28-47 (2008).[14]

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[14] Petitioners accurately note that one of the purposes of the qualified immunity doctrine is to reduce the possibility that public officials will have to answer personally for wrongful conduct and thereby incentivize the country's best and brightest to serve in the government. *See* Pet. Br. at 16. On the other side of the ledger, however, we also must consider that the failure to vigorously protect the rights of immigrants and individuals in the United States who have certain characteristics will also limit the best and the brightest of the world from taking part in the American dream and contributing to our society. For example, Balbir Singh Sodhi came to the United States to escape religious persecution in India, *see* Mike Anton, Collateral Damage in War on Terrorism, L.A. TIMES, Sept. 22, 2001, at A-26, only to be murdered in Mesa, Arizona on September 15, 2001, "for no other reason than because he was dark-skinned, bearded, and wore a turban," Trial Begins for Man Charged with Killing Sikh Immigrant, CNN, Aug. 18, 2003. It is less likely that immigrants would come to or stay in this Nation if they are subject to discriminatory conduct, particularly if that conduct is sanctioned by the courts. *See* PBS Foreign Exchange, Jan. 14, 2006 (discussing "educated and

At the same time, the government engaged in investigative and security measures after 9/11 that focused on race, religion, and national origin. For example, in the airport setting, Muslims, Arabs, South Asians, and Sikhs were subjected to heightened screening, prohibited from boarding their flights, and even ejected from planes on account of their appearance or perceived religion. The number of such post-9/11 incidents has been reported to be in the dozens, with one 2002 count reaching 191 incidents. *See* Ahmad, 92 CAL. L. REV. at 1269; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1576 n.1 (2002) (citation omitted).

The government also implemented several immigration programs in order to round up Muslims with the hope that terrorists would be among those collected in the government's wide-net. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 810 (2007) ("In the immediate aftermath of the attacks, federal officials conducted sweeps in which they rounded up over a thousand noncitizens" where "[n]early all of these noncitizens were from predominantly Muslim countries."). For example, the government's special registration program required aliens from countries, almost all of which are predominantly Muslim, to report to the INS to be fingerprinted and photographed, and possibly interrogated. *See* Registration and Monitoring of Certain Nonimmigrants From Designated Countries, 67 FED. REG. 57,032 (Sept. 6, 2002). In addition, the

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skilled immigrants" leaving the United States, a trend known as "reverse brain drain" or "flight capital," which came to a head after 9/11 when America "started to impose very heavy and ham-fisted immigration policies on both newcomers and potential arrivals.").

Absconder Apprehensive Initiative aimed to "locate, apprehend, interview, and deport" approximately "several thousand" individuals from countries where there was an "al Qaeda terrorist presence or activity," again predominantly Muslim countries. *See* Memorandum, the Deputy Attorney General, U.S. Dep't of Justice, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002). Also, under Operation Liberty Shield, asylum seekers "from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated" would be detained for the duration of their asylum proceedings. *See* Press Release, Dep't of Homeland Security, Operation Liberty Shield (Mar. 17, 2003), available at: http://www.dhs.gov/xnews/releases/press_release_0115.shtm. Pursuant to a separate interview program, eight thousand Arab, Muslim, and South Asian men were called in for "voluntary" questioning. *See* Ahmad, 92 Cal. L. Rev. at 1271. The impact of these policies on those from predominantly Muslim countries is clear. For example, "[b]etween September 2001 and September 2002, the number of deportable Pakistanis apprehended increased 228%" and the number of Pakistanis deported rose 129%. *Id.* at 1269.

Moreover, "a feature of the government's response to the attacks of September 11 has been its campaign of mass preventive detention," in which 1,147 individuals were detained by early November 2001. David Cole, Enemy Aliens, 54 STAN. L. REV. 953, 960 (2002).[15] Under this feature, the

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[15] Ostensibly because of the large number of detainees, Petitioners and Judge Cabranes appear to be concerned that this suit will lead to abuse by eager litigants and will thus burden Petitioners. *Amici* contend that this concern is speculative – Peti tioners have not shown that, in the seven

government held individuals until it was determined that they did not pose a security threat. *See* OIG Report at 39 (quoting then-Assistant Attorney General Michael Chertoff as saying, "we have to hold these people until we find out what is going on."). Respondent Iqbal was arrested as a result of identity theft charges, not an immigration sweep. But he was in the system nonetheless and, because he was a Muslim and thus presumptively dangerous, he was part of the government's campaign of mass detention. *See* OIG Report at 20-21, 69, 158, 196 (suggesting that persons, mainly from Muslim and Arab countries, were detained and classified as persons of "high interest" arbitrarily and without evidence of terrorism).

Here, the nature of the government's overall security approach to the 9/11 attacks – which appears to have focused on race, religion, and national origin rather than an individual's actual link to terrorism – is consistent with Respondent Iqbal's claim that "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks – however unrelated the arrestee was to the investigation – were immediately classified as 'of interest' to the post-September-11th investigation." Compl. ¶ at 52. It also supports the related contention that Respondent's assignment to the ADMAX SHU was based on race, religion, or national origin. It also supports the Second Circuit's

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years since 9/11, they have been inundated by frivolous lawsuits filed by individuals alleging discrimination in the aftermath of the attacks, or that district courts were unable to manage discovery in post-9/11 discrimination cases against high-level government officials.

determination that "it is plausible to believe that [Petitioners] would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies." 490 F.3d at 166. Indeed, Petitioners would have us believe that they – who were charged with leading the law enforcement and intelligence communities' response to the attacks – did not affirmatively approve, condone, or know of, the detention of hundreds of individuals in a federal facility in New York created specifically after 9/11, a facility that was only one of two that were the subject of the OIG Report.

This cannot be squared away, however, with the OIG Report, *see* OIG Report at 157 ("the security risk posed by individual September 11 detainees or their potential connections to terrorism" were decisions "made by the FBI in consultation with the U.S. Attorney's Office in the Southern District of New York and were communicated to the INS."), a brief from two former high-level FBI officers, *see* Resp. Rolince, *et al.*, Br. at 26 ("FBI Supervisors" designated individuals as persons of "high interest"), the Second Circuit's ruling, *see* 490 F.3d at 166 (it is plausible that Petitioners "would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies."); *id.* at 175-66 (commenting on the "likelihood that [Petitioners] would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City

area and designated 'of high interest' in the aftermath of 9/11."), or the district court's opinion, *see Elmaghraby*, 2005 WL 2375202, at *20 ("the post-September 11 context provides support for plaintiffs' assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined[.]").

Amici contend that the post-9/11 context, taken as a whole, supports the Second Circuit's conclusions with respect to Petitioners' personal knowledge of the discriminatory conduct taken against Respondent Iqbal.

* * *

Respondent Iqbal's allegations of discrimination on the basis of his race, religion, and national origin, accepted as true, are plausible. *Amici* urge the Court to grant Respondent the modest relief he seeks – to move beyond the pleadings stage and be given an opportunity to prove that he has sufficient facts to support his claims.

CONCLUSION

The Court of Appeals' judgment with respect to claims of discrimination should be affirmed.

Respectfully submitted,

Dawinder S. Sidhu
1717 Massachusetts Ave.
Suite 101
Washington, DC 20009
(202) 297-1046

Brian E. Robinson*
Amardeep S. Bhalla
The Sikh Coalition
40 Exchange Place
Suite 728
New York, NY 10005
(212) 655-3095

* *Counsel of Record*

AMICUS CURIAE BRIEF

Oct. 31, 2008

No. 07-1015

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,

Petitioners,

v.

JAVAID IQBAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, YASSER EBRAHIM, HANY IBRAHIM, SHAKIR BALOCH, AKHIL SACHDEVA AND ASHRAF IBRAHIM IN SUPPORT OF RESPONDENT JAVAID IQBAL

RACHEL MEEROPOL
MATTHEW STRUGAR
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6464

C. WILLIAM PHILLIPS
MICHAEL WINGER
Counsel of Record
KIMBERLY ZELNICK
DOUGLAS BLOOM
JOANNE SUM-PING
Covington & Burling LLP
620 Eighth Avenue
New York, NY 10018
(212) 841-1000

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Ibrahim Turkmen, Asif-Ur-Rehman Saffi, Yasser Ebrahim, Hany Ibrahim, Shakir Baloch, Akhil Sachdeva and Ashraf Ibrahim hereby move this Court, pursuant to Rule 37.3, for leave to file the attached brief *amicus curiae* in support of respondent Javaid Iqbal. The petitioners and respondent Iqbal have consented to the filing of this brief, along with respondents Kenneth Maxwell, David Rardin and Dennis Hasty, but respondents Michael Rolince, Katherine Hawk Sawyer, and Michael Cooksey have declined to consent. Correspondence reflecting the consents has been lodged with the Clerk.

Amici are plaintiffs in an action entitled *Turkmen, et al. v. Ashcroft, et al.* pending in the United States District Court for the Eastern District of New York (02 CV 2307 (JG) (SMG)), asserting claims against petitioners and others similar to the claims in the instant case, and consolidated with the instant case for discovery. Appeals in *Turkmen* by petitioners and others to the United States Court of Appeals for the Second Circuit from an order of the District Court denying in part their motion to dismiss the complaint were argued in February, 2008, and are now awaiting decision. Petitioners make many of the same arguments on their appeals in *Turkmen* as they do before this Court.

Like respondent Iqbal, *amici* are non-citizens arrested following September 11, 2001, and detained as "of interest" to the FBI's investigation of the terrorist attacks. All were eventually cleared of any connection to terrorism, and removed from the United States under the Immigration and Naturalization Act. The only *amicus* charged with or convicted of any criminal act is Shakir Baloch, who pled guilty to possession of false documents.

Like respondent Iqbal, *amici* believe (and allege in *Turkmen*) that while in custody they were subjected to punitive conditions of confinement on the basis of their race and religion. Like respondent, *amici* allege that their treatment was part of a nationwide pattern, described in reports of the Office of the Inspector General of the Department of Justice, directed by petitioners Ashcroft and Mueller.

In this brief, *amici* offer supplementary arguments against imposing a special pleading standard for claims against "high-ranking officials." They also present to the Court material, obtained during discovery in their action and Iqbal's of parties other than petitioners, which illustrates information that has already appeared concerning petitioners' role in this nationwide pattern of conduct, as well as avenues for further discovery of that role. They submit that this material shows that an injustice would be done if Iqbal's claims were dismissed without an opportunity to take the limited discovery contemplated by the Second Circuit's decision.

Respectfully submitted,

Rachel Meeropol
Matthew Strugar
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6464

C. William Phillips
Michael Winger
Counsel of Record
Kimberly Zelnick
Douglas Bloom
Joanne Sum-Ping
Covington & Burling LLP
620 Eighth Avenue
New York, NY 10018
(212) 841-1000
Counsel for Amici Curiae

Dated: October 31, 2008

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the foregoing Motion for Leave to File.[1]

SUMMARY OF THE ARGUMENT

On this appeal, petitioners wash their hands of the discriminatory treatment of respondent, *amici*, and hundreds of other Muslim non-citizens, maintaining that if petitioners' subordinates acted inappropriately, this Court should assume petitioners were not involved. In so doing, petitioners urge the Court to require plaintiffs asserting racial and religious discrimination claims against "high-ranking officials" to detail the specific methods and tools of governmental discrimination: where meetings occurred; who spoke; and what was said, to adequately plead a case. Respondent Iqbal did not have access to such detail when this case was filed. But detail is emerging now. *Amici* share with the Court the fruits of discovery in this case and *Turkmen*, to illustrate how it is precisely claims against "high-ranking officials" which require discovery to uncover the details.

Petitioners maintain that the protection of a vaguely defined class of "high-ranking officials" from "frivolous lawsuits" requires a special rule available to no other defendant, or potential defendant. Beyond the sanctions of Rule 11; beyond demands for

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

particulars; beyond motions for summary judgment; beyond even the qualified immunity available in appropriate circumstances to any government employee—beyond all this, we are told, "high-ranking officials" require the special protection of a special rule of pleading.

This Court has already rejected that argument, raised by dissenting Justices Black and Blackmun in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and subsequent history has not vindicated the dissenters' fears. Petitioners rest their case on a single example, former Attorney General Edward Levi (Pet. Br. at 40-41). In fact, petitioners' own source for General Levi's experience demonstrates the minimal burden imposed by *Bivens*: all of the suits were resolved without Attorney General Levi having to testify, even in a deposition, and the Justice Department thought it unnecessary even to tell the Attorney General about most of the suits. *See below, at* 20-23.

The present case makes an odd vehicle for petitioners' renewal of this argument. At issue here is not a small or local operation, in which it is plausible to suppose the heads of the Department of Justice and the FBI had no role, but a massive, nationwide program in which petitioners played a prominent, public part. Press conferences and public speeches by petitioners regarding the 9/11 investigation as it proceeded are noted in the April 2003 report of the Justice Department's Office of the

Inspector General.[2] Meetings and conversations of other senior Department of Justice and FBI officials are scattered throughout that report; to suppose that all of this activity took place without the participation of petitioners strains the imagination.[3]

But in seeking to discover what senior officials were responsible for their treatment, respondent and *amici* face the same problem as anyone investigating a large, complex operation: the underlings may be easily identified, but proceeding up the chain of command requires diligence and patience. If the details of higher-ups' conduct had to be set out at the beginning of an investigation, a wide variety of investigations would be sharply curtailed.

Here, discovery already conducted in the district court, limited as it has been to discovery from non-parties and parties not claiming qualified immunity, further indicates the involvement of petitioners in the discriminatory arrest and detention of 9/11 detainees, which additional discovery is needed to clarify. As set forth below, an Immigration and Naturalization Service manual required detailed daily reports to the Attorney General, and states that the Attorney General used those reports to brief other senior officials; but the reports themselves (with the exception of one sample

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[2] Office of the Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, at 4 n.8, 11 n.20, 12-13 (April 2003) <http://www.usdoj.gov/oig/special/0306/full.pdf> (*OIG Report*).

[3] See, for example, *id.*, at 12-13, 15, 19-20, 37-40, 55-57, 62, 66, 75, 81, 106.

included in the manual) have not been produced. *See below*, at 9-12. Documents from the FBI files of *amici* indicate that the tips which led to their arrest and classification as "of interest" singled them out by race and religion; this was not merely an occasional occurrence but the result of a policy to detain without vetting individuals encountered in the course of an investigation driven by 96,000 public tips, almost all of which evidently proved worthless to the investigation.[4] *See below*, at 7-8. More investigation is required to determine whether petitioners directed that Muslim and Arab men be treated as "of interest" to the terrorism investigation without regard to any evidence connecting then to terrorism, or merely acquiesced to their subordinates' biased investigation. *See below*, at 14-20.

These inquiries are not frivolous; the *OIG Report* documents the serious issues raised by the government's treatment of 9/11 detainees like Iqbal and *amici*. And with all due respect to petitioners, whose public service as "officials charged with protecting our nation" *amici* recognize: their public service only entitles them to immunity provided they acted reasonably. This Court rejected absolute immunity for the Attorney General, along with other executive officials short of the President, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). It should not now use a special pleading rule to create an effective equivalent to absolute immunity by making it impossible to plead a claim against "high-ranking officials" without the aid of discovery, and impossible

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[4] *See OIG Report*, at 12 (96,000 tips received in the first week).

to attain an opportunity to take discovery without inside knowledge of detailed workings at the highest levels of government at the time of filing a complaint.

ARGUMENT

I. Respondent Adequately Alleges Petitioners' Involvement in Classifying *Amici* and Respondent Based on Race and Religion.

There is ample ground to suspect racial and religious discrimination in the treatment of respondent, *amici*, and other 9/11 detainees; the District Court and Court of Appeals refused to dismiss respondent's equal protection claim, and that action is not challenged here. Petitioners say only that they should not be held to account for any discrimination—not because there was no discrimination, or even because they had no role in such discrimination, but because respondent's complaint fails to show that petitioners' involvement is "plausible."

Petitioners argue that the context of this case—"the government's response to an unprecedented national-security crisis . . . [in which the] former Attorney General and current Director of the FBI . . . headed the largest investigation in American history"—demands dismissal prior to discovery because respondent has not properly alleged the "particular steps" petitioners took to approve, condone or ratify the discriminatory policy, including when, where, and with whom the actions occurred. Pet. Br. at 13, 39. They dismiss the circumstantial evidence that race and religion were the predominant factors in 9/11 arrests, reasoning:

> [I]f petitioners were aware that a high proportion of Arab or Muslim men were among the detainees "of high interest," that alone would not have given them cause to believe that the list reflected racial or religious discrimination—any more than would a predominance of Irish suspects in an investigation of the IRA.

Pet. Br. at 35. The analogy is interesting; but it requires development. If 762 Irishmen were arrested in such an investigation; if almost all were arrested on the basis of tips from the public, in circumstances in which a general public hostility to the Irish might be feared; if none of the 762 proved to have an actual connection to the IRA; would it then be implausible to suspect that those running the investigation were infected by bias? And would it be appropriate to shield them from any liability for bias, unless detailed evidence of bias could be put forward at the very beginning of a lawsuit?

Petitioners rely heavily on an assumption that, given the size of the 9/11 investigation, "there is every reason to assume that the Attorney General and the Director of the FBI did *not* personally do more than . . . approve a general policy of using highly restrictive confinement for any detainee 'of high interest'" to the terrorism investigation. Pet. Br. at 36-37 (emphasis in the original). Discovery conducted thus far, however, tells a different story.

Amici agree with respondent that Iqbal's complaint is adequately pled under settled Supreme Court precedent. In the context of this case—a critical investigation conceived and implemented at the very highest levels of government—no additional

detail is necessary to buttress the plausibility of respondent's allegations.

But as it happens, the detail petitioners demand, though unavailable to respondent prior to discovery, is now emerging. Through the usual means, *amici* have uncovered significant factual material regarding the *who, what, where* and *when* of petitioners' personal involvement in the discriminatory actions challenged by respondent. *Amici* share this material with the Court to illuminate the probable result of the new rule urged by petitioners: the precipitous dismissal of a significant and meritorious challenge to illegal and discriminatory action by high-ranking government officials for failure to plead details that can only be uncovered through the process of discovery detailed in the Federal Rules.

A. *Amici*, Respondent, and Other 9/11 Detainees Were Classified Based on Their Race and Religion.

As a threshold matter, it is clear that the 9/11 detentions involved racial and religious profiling. The *OIG Report* recounts how the FBI's watch list of "more than 100 names" was supplemented within a week by "more than 96,000 tips or potential leads from the public." *OIG Report* at 11-12. In the resulting investigation the government arrested and detained thousands of Muslims (Complaint ¶ 47; Pet. App. 164a) from Middle Eastern or South Asian countries (*OIG Report* at 21). The *OIG Report* illustrates the quality of the tips: a store is "operated by numerous Middle Eastern men . . . . Too many people to run a small store"; an alien who "would like to learn how to fly an airplane"; Middle

Eastern men with "pictures of the World Trade Center and other famous buildings." *Id.* at 16-17. Race is conspicuous; and facts plausibly suggesting a connection to terrorism are absent.

The implications of these facts regarding the role of pervasive discrimination in the treatment of respondent, *amici*, and the other 9/11 detainees are underscored by documentation, produced by the United States in *Turkmen*, of the tips which led to *amici's* treatment as "of interest." *Amici* Hany Ibrahim and Yasser Ebrahim were reported to authorities as "Middle Eastern Males . . . renting a mailbox and possibly sending out large quantities of money." Affirmation of Michael Winger made October 30, 2008, ¶ 3, Exh. A; *see* attached Appendix at 1a (hereafter, the affirmation and its exhibits are referred to by the page of the appendix, in the form _a). *Amicus* Ashraf Ibrahim was described as one of "three males, who appeared to be Arabs," who sought to purchase a used truck to carry water and gave "vague" answers to questions about what kind of containers the water would be carried in and whom they would deliver it to. 4a. *Amicus* Baloch was "a male, possibly Arab," with a fake Social Security card. 7a. *Amicus* Sachdeva was said to have been speaking in Arabic (although in fact he is a Hindu from India), and to have talked about "flying and flight simulators." 8a. *Amicus* Saffi, a Pakistani by birth, appears to have been arrested solely because he had been refused admission to Canada. 12a. There is nothing to show a reason for suspicion of *amicus* Turkmen in the FBI file produced by the United States except a tip concerning three other Turkish men, apparently based on their being Turkish. 14a-16a.

B. Discovery Supports Petitioners' Awareness of the Biased Nature of the 9/11 Sweeps.

Petitioners disavow knowledge of or involvement in the biased nature of the 9/11 sweeps, (Pet. Br. at 5), but discovery paints a different picture. According to a document produced by the United States in this action and *Turkmen*, the Commissioner of the INS submitted a daily "Attorney General Report" to petitioner Ashcroft, detailing information relevant to the 9/11 investigation.[5] Among other relevant statistics, the report details the number of aliens taken into custody each day along with the "number of aliens taken into custody during joint field interviews *after* which it is determined there is no nexus to the investigation." 20a. According to the deposition testimony of Walter Cadman, the Director of the National Security Unit ("NSU") of the INS, the latter figure probably represented aliens who were arrested in connection to the terrorism investigation, and thus treated as terrorist suspects, for whom it was eventually determined the FBI lacked any investigative

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[5] One such Attorney General Report is attached in the Appendix, 20a-24a. The Report is excerpted from the "INS Headquarters Standard Operating Procedure," produced by the United States (to be lodged with the Court pursuant to Rule 32) ("INS SOP"), at INS NSU SOP 09232001 000017-19, marked for lodging as L119-21, see also INS NSU SOP 09232001 000010, marked for lodging as L112.

interest.[6] Mr. Cadman distinguished such aliens, who were "swept up" in the investigation as "collateral arrests," from those in whom the FBI originally had a genuine investigative interest, but later cleared of any connection to terrorism.[7]

Each Attorney General Report also includes a "notes" section that calls for a narration of "events relevant to the criminal investigation and the mission of the INS," to be used by the Commissioner and the Attorney General to prepare for daily briefings with the National Security Council and the President.[8] The only Attorney General Report produced thus far recounts that 48 Muslims were held for questioning after they exited a religious service next door to the site of a search warrant operation. 22a. There does not appear to have been any basis to question the individuals other than their appearance and attendance at a religious service.

Amici have reason to believe that the balance of reports will provide even more compelling information. In an interview with the OIG, the NSU personnel responsible for providing information for the "notes" section stated that the Attorney General Reports "showed the details of all aliens in INS custody who had a possible 'nexus to terrorism.'"[9]

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[6] Transcript of the Deposition of Walter Cadman (to be lodged with the Court pursuant to Rule 32), hereafter "Cadman Dep." at 122-23, marked for lodging as L280-81.

[7] Id.

[8] INS SOP at INS NSU SOP 09232001 000015-16, marked for lodging as L117-18.

[9] OIG "Record of Interview" with Kinsman Corthell, Shawn Ebbley, Mark LaMonte, and Louis Nardi, produced by the (...continued)

Along these lines, the manual instructs that the "Notes" section of the Attorney General Report is to be drawn from Significant Incident Reports, or "SIRs" and other reports received by the NSU and that the narrative should "err on the side of inclusion." 19a. SIRs and reports received by the NSU recount the dubious tips that led to each alien's arrest along with any subsequent FBI investigation. For example, the SIR for *amicus* Akhil Sachdeva indicates that Sachdeva was encountered during a field operation predicated upon a WTC lead, and states that FBI interest in Sachdeva is currently "undetermined." 25a.

If the Attorney General Reports contained such details of the tips and investigation, then petitioner Ashcroft had a clear indication that the FBI had no non-discriminatory basis for suspecting *amici,* respondent, and others of ties to terrorism. While it is not yet clear whether petitioner Mueller also received detailed reports, in his interview with the OIG Mueller acknowledged being aware that a number of people were detained by the INS because of a "pass[ing] assoc[iation] w[ith] Penttbom."[10] This evidence was unavailable to respondent prior to discovery, and indeed, it appears that the balance of the Attorney General Reports may have been

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United States (to be lodged with the Court pursuant to Rule 32) at OIG ROI Corthell Ebbley LaMonte Nardi 04172002 000005, marked for lodging as L97.

[10] OIG Notes of Interview with FBI Director Robert Mueller, produced by the United States (to be lodged with the Court pursuant to Rule 32) at Mueller000004, marked for lodging as L10.

destroyed.[11] Thus only deposition testimony may uncover their nature.

It appears that petitioners were also provided lists of the 9/11 detainees that underscored the paucity of evidence connecting many to terrorism. Michael Pearson, INS Executive Associate Commissioner for Field Operations, testified at his deposition:

> There was a lot of things going on after September 11 and a lot of high level involvement. I mean commissioner dealing with Attorney General's office, I'm sure the Attorney General's office working with the White House and all that and working with the FBI.
>
> So the information we provided, the significant interest list[12] went over to the department daily. In fact, any time we had a significant update it would go over to it. And because I was presenting it to higher headquarters, I made sure that the chief of staff, the deputy commissioner and the commis-

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[11] The OIG does not appear to have located the reports despite notes indicating their plan to do so, and counsel for the United States has thus far also been unsuccessful in locating the reports despite *amici's* request.

[12] In subsequent testimony Pearson said that by "significant interest list" he meant what was usually termed the "special interest list." Transcript of Deposition of Michael Pearson, (to be lodged with the Court pursuant to Rule 32), at 136, marked for lodging as L524.

> sioner were aware of it and they were intimately aware.[13]

The "special interest list" provides each suspect's name, detention location, and a narrative in which the FBI's interest in and investigation of each detainee is noted.[14] Where there is any information to tie the detainee to a known terrorist, or to the known characteristics of the hijackers, that information was also noted. *See e.g.* 27a. For example, the narrative summary for alien "A"[15] indicates that he was the co-insurer on an auto insurance policy with one of the hijackers, that he accompanied the hijacker to flight school, and that he served as the hijacker's interpreter. 27a. Similarly, the narrative summary for alien "B" states that he was an acquaintance of two of the hijackers. 29a.

For *amici* and respondent, however, no such ties exist, and thus no information appears on the list to explain the FBI's "interest" in each individual. The entry for Shakir Baloch, for example, states only that he was in possession of a forged license, and will be prosecuted for fraudulent documents and INS reentry. 31a-32a. The entry for Asif Saffi provides no information other than the assignment and reassignment of his case to various agents. 35a.

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[13] Id. at 135-36, marked for lodging as L523-24.

[14] Excerpts from the "Special Interest List" are attached in the Appendix; the entire list produced by the United States is to be lodged with the Court pursuant to Rule 32, marked for lodging as L132-57.

[15] Identifying information regarding detainees other than *amici* has been redacted.

Finally, the entry for respondent Iqbal indicates that he is being charged criminally for making false statements. 33a. The list, dated 5/13/02, shows that Iqbal remained in custody at Metropolitan Detention Center for months despite an apparent lack of activity on his case after January 31, 2002.[16]

C. More Discovery Is Necessary to Determine the Extent to Which Petitioners Directed that the Sweeps Be Carried Out in a Biased Manner.

Discovery in the *Turkmen* matter has already uncovered some evidence to suggest that petitioners were not only aware of the detainees' lack of connections to terrorism, but also ordered that Muslim and Arab men without true FBI interest be treated as "of interest" to the investigation, and be placed in extraordinarily restrictive conditions of confinement.[17]

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[16] "Special Interest List," produced by the United States (to be lodged with the Court pursuant to Rule 32) at FBI Supplemental Release 000168, marked for lodging as L149.

[17] Besides the "of interest" designations, two other programs instituted by petitioner Ashcroft also singled-out non-citizens based on religion and race. *See* John Ashcroft, Memorandum to United States Attorneys and Members of the Anti-Terrorism Task Forces on Interviews Regarding International Terrorism (November 9, 2001), <http://www.usdoj.gov/ag/readingroom/terrorism1.htm>; U.S. General Accounting Office, *Homeland Security: Justice Department's Project to Interview Aliens after September 11, 2001* at 7 (Apr. 11, 2003), <http://www.gao.gov/new.items/do3459.pdf> (program to interview selected individuals from fifteen predominantly Muslim countries regarding the terrorist attacks); John Ashcroft, "Prepared Remarks on the National Security Entry-Exit Registration (...continued)

First, a Supervisory Special Agent detailed to the FBI's Office of General Counsel told the OIG that Ashcroft ordered specific individuals placed on the FBI's watchlist, including five Yemenis who lacked the required connection to the 9/11 hijackers.[18]

Second, petitioner Ashcroft may have ordered the wholesale inclusion of hundreds of 9/11 detainees from New York onto the national custody list. In New York, every individual arrested in connection to a PENTTBOM lead was held as a 9/11 detainee, yet many of these names were initially not sent to INS headquarters to be included on the national custody list. *OIG Report* at 53. In October of 2001, INS officials at Headquarters learned of approximately 300 individuals being held in New York as 9/11 detainees. *Id.* at 53-54. At meetings to discuss merging the New York and national custody lists, several individuals expressed concerns that the New York list had not been properly vetted, and that the FBI could not affirmatively state any interest in many of the detainees. *Id.* Nevertheless, Stuart

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System" (June 6, 2002), <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>; *see also* Department of Justice, immigration and Naturalization Service, "Registration of Certain Nonimmigrant Aliens from Designated Countries," 67 Fed. Reg. 67,766 (Nov. 6, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002); 67 Fed. Reg. 77,642 (Dec. 18, 2002); 68 Fed. Reg. 2363 (Jan. 16, 2003) (program requiring males over the age of sixteen from twenty-four predominantly Muslim countries plus North Korea to report to immigration offices or face arrest, detention, or deportation).

[18] OIG notes of interview with Supervisory Special Agent (Name Redacted), produced by the United States (to be lodged with the Court pursuant to Rule 32) at 000007, marked for lodging as L82.

Levey, the Associate Deputy Attorney General for immigration, ordered that everyone from the New York list be incorporated into the national list. *Id.* at 55-56. Walter Cadman, one of the meeting attendees, testified at his deposition that he understood Mr. Levey to be making this decision with the Attorney General's authority.[19]

Along with directing the race-based targeting of *amici* and respondent, there is also reason to believe that petitioners directed, or at least knew of, the policy of subjecting these dubiously identified "of interest" detainees to extremely restrictive conditions of confinement.

First, petitioners' subordinates and colleagues spoke to the OIG of petitioners' personal involvement. Dan Levin, Director Mueller's chief of staff, told the OIG of a "continuous" meeting the first few months after 9/11 involving the Director and the Attorney General, among others.[20] According to Principal Associate Deputy Attorney general Christopher Wray, petitioner Ashcroft and a small group mapped out ways to exert "maximum pressure" on the terrorism suspects.[21] This included delaying their immigration hearings and restricting their ability to contact the outside world.[22] "Let's not

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[19] Cadman Dep. at 199-200, marked for lodging as L357-58.

[20] OIG Notes of Interview with Dan Levin, produced by the United States (to be lodged with the Court pursuant to Rule 32) at Levin000006, marked for lodging as L47.

[21] OIG Notes of Interview with Chris Wray, produced by the United States (to be lodged with the Court pursuant to Rule 32) at 1, marked for lodging as L19.

[22] Id.

make it so they can get Johnnie Cochran on the phone," the OIG notes report.[23] Consistent with these reports, INS Commissioner Ziglar told the OIG that he discussed the "roundup" and the "whole process of interviewing and incarcerating out of status individuals" at a meeting with the Attorney General.[24] And petitioner Ashcroft told the OIG that he had been involved in frequent discussion regarding the detainees' need for counsel, and was aware of at least some of the department's attempts to address that issue.[25]

Second, the OIG interviews make clear the extent to which petitioners' high-level subordinates were involved in decisions regarding detention conditions. Ashcroft's deputy chief of staff, David Israelite, recalled brainstorming about possible ways to "be aggressive,"[26] and the Deputy Attorney General's chief of staff David Laufman recalled discussions early on about conditions of confine-

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[23] Id.

[24] Email from Catherine Sheehan to Tamara Kessler re: Ziglar, dated Sep. 24, 2002, produced by the United States (to be lodged with the Court pursuant to Rule 32), at Ziglar000015, marked for lodging as L101.

[25] OIG "Memorandum of Investigation" re: Interview with Attorney General John Ashcroft, produced by the United States (to be lodged with the Court pursuant to Rule 32) at Ashcroft000009, marked for lodging as L5.

[26] OIG Notes of Interview with David Israelite, produced by the United States (to be lodged with the Court pursuant to Rule 32), hereafter "Israelite interview," at Israelite000005, marked for lodging as L31.

ment.[27] Similarly, Mueller's chief of staff, Dan Levin, states that he "is sure" that how and where to hold the detainees was discussed and he believes that limitations on communication and access to counsel may also have been discussed.[28]

Petitioners' personal involvement with the details of detention and treatment is not surprising in the context of the 9/11 investigation. Control over all aspects of the investigation was tightly centralized out of Washington, featuring close involvement of some of the highest ranking federal officials. The FBI's high-security Strategic Information and Operations Center, also known as SIOC, located at FBI Headquarters, became the center of the investigation. *OIG Report* at 11. Based out of SIOC, federal law enforcement officials quickly identified the hijackers, pursued leads related to them, and began developing a watch list of potential hijackers and other individuals who may have been planning terrorist attacks against America. *Id.* at 11.

Petitioner Ashcroft, en route to Milwaukee at the time of the attacks, hurriedly returned to Washington and arrived at SIOC by the late morning.[29] Petitioner Mueller was already there.[30] There began the "continuous" meeting.

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[27] OIG Notes of Interview with David Laufman, produced by the United States (to be lodged with the Court pursuant to Rule 32) at Laufman000006, marked for lodging as L39.

[28] OIG Notes of Interview with Dan Levin, produced by the United States (to be lodged with the Court pursuant to Rule 32) at 2 & Levin000007, marked for lodging as L43 & L48.

[29] Steven Brill, *After: How America Confronted the September 12 Era*, at 14 (2003).

FBI Headquarters tightly controlled all decision making regarding the 9/11 detainees. FBI Headquarters required that the results of all detainee interviews be provided to SIOC. 32a-33a. FBI Headquarters exercised final say on whether a detainee was "of interest" to the 9/11 investigation and cautioned that it was "essential that the decision as to whether or not to seek continued detention is made centrally by headquarters rather than by individual field offices." *Id.* FBI Headquarters coordinated CIA names checks on individual detainees, *OIG Report* at 50, and by October 2001, FBI Headquarters performed the entire investigation and clearance process of the detainees. *OIG Report* at 48, n.42.

Details such as housing determinations and conditions, typically left to lower level officials in the INS and BOP, were dictated from FBI Headquarters and high levels of the Justice Department. FBI Headquarters requested that individual detainees be moved or placed in restrictive housing.[31] And DOJ personnel, including David Laufman, chief of staff to the Deputy Attorney General, and Principal Associate Deputy Attorney General Christopher Wray called Kathy Hawk Sawyer, director of the Bureau of Prisons, soon after 9/11 with concerns about detainees' ability to communicate with other inmates and the public. *OIG Report* at 112. Hawk Sawyer described the restrictions in place for the 9/11 detainees and Laufman and Wray instructed her "not [to] be in a hurry" to provide 9/11 detainees

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[30] Id.

[31] Pearson Dep. at 113, marked for lodging as L501

with access to communications, including legal or social calls or visits, so that the FBI would have a chance to "do their job."[32] *OIG Report* at 113.

Michael Cooksey, the BOP's Assistant Director for Correctional Programs, confirmed that instructions and guidance on handling detainees came from the Department [of Justice] and the FBI and that the decision to utilize the Special Housing Unit to hold 9/11 detainees was made in meetings with the DOJ.[33]

The factual material described above does not prove petitioners' liability—but it does provide the detail that petitioners would demand. At this point in discovery—and even without discovery of petitioners—*amici* can describe much of the *who, when, where* and *how* of petitioners' involvement in the discriminatory classification alleged by respondent. But to demand this level of factual detail prior to discovery is to erect a *de facto* rule of absolute immunity for "high-ranking officials," in contradiction to over three decades of Supreme Court precedent.

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[32] OIG "Memorandum of Investigation" re: interview with Kathy Hawk Sawyer, produced by the United States (to be lodged with the Court pursuant to Rule 32) at 2-3, marked for lodging as L57-58.

[33] OIG Notes of Interview with Michael Cooksey (typed), produced by the United States (to be lodged with the Court pursuant to Rule 32) at 1, marked for lodging as L61, and OIG Notes of Interview with Michael Cooksey (handwritten), produced by the United States (to be lodged with the Court pursuant to Rule 32) at 3-4, marked for lodging as L66-67.

II. Permitting This Case to Proceed to Discovery Would Not Open the Floodgates to Frivolous Lawsuits.

To support their case for a heightened pleading standard, petitioners raise the specter of a flood of "frivolous lawsuits" haunting "high-ranking officials" even after they leave office. *See, e.g.*, Pet. Br. at 19, 40-41. This Court has already rejected that argument.

The same concern was raised by Justices Black and Blackmun in their dissents in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), suggesting that this Court's recognition of a right of action against federal officials in their personal capacities for violations of an individual's constitutional rights would trigger an "avalanche" of litigation. *Id.* at 430 (Blackmun, J. dissenting). Justice Black wrote that "[w]e sit at the top of a judicial system nearing the point of collapse." *Id.* at 429. He feared that an onslaught of "frivolous" lawsuits brought about by *Bivens* would press the system past the tipping point; moreover, such actions would "tend to stultify proper law enforcement and . . . make the day's labor for the honest and conscientious officer even more onerous." *Id.* at 430.

The majority rejected that argument. *Id.* at 391 n.4. Justice Harlan observed in his concurrence:

> There is, however, something ultimately self-defeating about this argument. For if, as the Government contends, damages will rarely be realized by plaintiffs in these cases . . . then I am not ready to assume that there will be a significant

> increase in the expenditure of judicial resources on these claims . . . .

Id. at 410. "[T]he possibility of 'frivolous' claims" is simply insufficient to "warrant[] closing the courthouse doors to people in [respondent's] situation"—particularly when doing so would effectively insulate those most directly charged with supporting and defending the Constitution from the consequences of violating its principles. *Id.*

As Justice Harlan anticipated, the justice system has effectively found "other ways . . . of coping with frivolous lawsuits." *Id.* The reality is that very few *Bivens* cases succeed. In the first twelve years following the *Bivens* decision, only 0.25% of suits against federal officials in their individual capacities resulted in judgments for the plaintiffs. *See* Perry M. Rosen, "The Bivens Constitutional Tort: An Unfulfilled Promise," 67 N.C. L. REV 337, 343-345 (1989). The rarity of successful suits should provide sufficient peace of mind to meet Judge Cabranes's concern that government officials "perform their sensitive duties with decisiveness and without potentially ruinous hesitation." (Pet. App. 70a) (Cabranes, J. concurring) (quoting *Mitchell v. Forsythe*, 472 U.S. 511, 541 (1985) (Stevens, J. concurring in the judgment)) (internal quotation marks omitted).

Nor has there been an "avalanche" of *Bivens* cases. As a former trial attorney in the Civil Division of the Department of Justice who specialized in defending *Bivens* suits observed, "[t]he paucity of victories for plaintiffs alleging deprivation of their constitutional rights demonstrates, however, more than a propensity by the general public to bring frivolous lawsuits against federal officials. It

reflects, instead, problems endemic to the *Bivens* action which have created an almost insurmountable bias against the plaintiff." Rosen, *supra*, at 344. A heightened pleading standard would add another barricade, preventing meritorious claims from being heard and further insulating "high-ranking officials" from any liability for violating clearly established constitutional rights.

Petitioners rest their argument on a single example: former Attorney General Edward Levi (Pet. Br. at 40-41). In fact, General Levi's experience demonstrates the minimal burden that *Bivens* has imposed on officials. A Westlaw search discloses only four reported decisions in *Bivens* actions naming Levi, all dismissed on the pleadings within a year of his departure from office. *See Morpurgo v. Bd. of Higher Ed. in City of New York*, 423 F. Supp. 704 (S.D.N.Y. 1976); *Cole v. Kelley*, 438 F. Supp. 129 (C.D. Cal. 1977); *Ostrer v. Aronwald*; 434 F. Supp. 379 (S.D.N.Y. 1977); *Brawer v. Levi*, 435 F. Supp. 534 (S.D.N.Y. 1977). Bennett Boskey, who represented the Attorney General in some of these actions and is petitioners' source for Levi's experience, recounts that before he became involved the Justice Department "never notified [the Attorney General] of any of these suits . . . [because] they were confident that they could get the claims dismissed in due course without bothering the Attorney General." Bennett Boskey, ed., *Some Joys of Lawyering*, at 113 (2007). In the end, all of the suits were resolved without Attorney General Levi having to testify, "even in a deposition." *Id.* at 114.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision below.

Respectfully submitted,

RACHEL MEEROPOL
MATTHEW STRUGAR
Center for
Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6464

C. WILLIAM PHILLIPS
MICHAEL WINGER
Counsel of Record
KIMBERLY ZELNICK
DOUGLAS BLOOM
JOANNE SUM-PING
Covington & Burling LLP
620 Eighth Avenue
New York, NY 10018
(212) 841-1000

Counsel for Amici Curiae

Dated: October 31, 2008

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

NO. 07-1015

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,

Petitioners,

v.

JAVAID IQBAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AFFIRMATION IN SUPPORT OF BRIEF FOR *AMICI CURIAE* AND MOTION FOR LEAVE TO FILE BRIEF

MICHAEL WINGER affirms:

1. I am an attorney admitted to practice in the State of New York, and a member of the Bar of this Court. I make this affirmation in support of the Brief for *Amici Curiae* Ibrahim Turkmen, Asif-Ur-Rehman Saffi, Yasser Ebrahim, Hany Ibrahim, Shakir Baloch, Akhil Sachdeva and Ashraf Ibrahim in Support of Respondent Javaid Iqbal, and the motion for leave to file the brief.

2. *Amici* are plaintiffs in an action entitled *Turkmen, et al. v. Ashcroft, et al.*, pending in the

United States District Court for the Eastern District of New York (02 CV 2307 (JG) (SMG)), asserting claims against petitioners and others similar to the claims in the instant case, and consolidated with the instant case for discovery.

3. Attached as Exhibits A through J are documents produced by the United States in discovery in these actions.

4. As originally produced, these documents were designated as containing information protected by the Privacy Act, and therefore subject to a protective order entered in the District Court. Counsel for the United States has now redacted all Privacy Act information, and has agreed that in their present form the documents are not subject to the protective order. All redactions are indicated on the exhibits.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 31, 2008.

s/ Michael Winger

Michael Winger

APPENDIX

Exhibit A

FBI Interest Document for Yasser Ebrahim & Hany Ibrahim

(produced by the United States)

File Number [redacted]

Title FBI LEAD NUMBER [redacted]

NYC

On September 30, 2001, S/A [redacted] and S/A [redacted] were instructed by SSA Love to respond to FBI lead number [redacted] with FBI agents [redacted] and [redacted]. The lead involved a group of Middle Eastern Males living at [redacted] in Brooklyn, NY renting a mailbox and possibly sending out large quantities of money. The following individuals were arrested for violation of the Immigration and Nationality Act.

Yasser Ebrahim Fathy EBRAHIM is a native and citizen of Egypt born 07/23/72 who entered the U.S. on or about 01/21/01 as a B2 Visitor with authorization to remain in the U.S. until 07/07/01. SUBJECT was arrested as a B2 Overstay at [redacted] in Brooklyn, NY. SUBJECT EBRAHIM'S passport number is 626008. He was in possession of a New York DL Number 599115989.

Hany Ibrahim Fathy EBRAHIM is a native and citizen of Egypt born 02/07/76 who entered the U.S. as a B2 visitor 08/04/98 with authorization to remain in the

Exhibit A

U.S. until 02/03/99. SUBJECT was arrested as a B2 overstay at **[redacted]** in Brooklyn, NY. SUBJECT EBRAHIM'S passport number is 907355.

[redacted] is a native and citizen of Egypt born **[redacted]** who entered the U.S. 07/17/01 as a B2 visitor with authorization to remain in the U.S. until 01/16/02. SUBJECT admitted to the reporting agent and SA **[redacted]** that he was employed at the **[redacted]** in Brooklyn, NY telephone # **[redacted]**. SUBJECT stated his boss's name is **[redacted]** and that he began working there around 09/13/01. Before working at the **[redacted]** SUBJECT stated he worked at **[redacted]** in Manhattan, NY. SUBJECT told the reporting agent he worked there from 07/24 or 25/01 to 09/13 or 14/01. SUBJECT was arrested as a nonimmigrant working without INS authorization.

[redacted] is a native and citizen of Egypt born **[redacted]** who entered the U.S. 02/27/00 as a B2 visitor with authorization to remain in the U.S. until 08/26/00. SUBJECT was arrested at his place of employment at **[redacted]** in Brooklyn, NY as a B2 overstay working without INS authorization. SUBJECT was also residing at **[redacted]** entered the U.S. on or about 07/17/01 as a B2 visitor [illegible] 01/16/02. SUBJECT was arrested at his place of employment at **[redacted]** in Manhattan, NY, telephone number **[redacted]**. SUBJECT was observed by the reporting agent working, waiting on customers. SUBJECT stated he had been working there about a month. SUBJECT was arrested as a

Exhibit A

nonimmigrant working without INS authorization. SUBJECT was also residing at **[redacted]** in Brooklyn, NY.

Also interviewed at **[redacted]** was **[redacted]** born **[redacted]** in Morocco. SUBJECT stated his Social Security Number is **[redacted]**. SUBJECT was determined to be a Lawful Permanent Resident of the U.S. through INS records checks.

One other individual is living at the apartment but was not present. Agents were told he was at **[redacted]** in Chelsea, MA 02150. SA **[redacted]** was told the individual was checking in to attending Medical School. His information is as follows. **[redacted]** country of citizenship Egypt, entered the U.S. 07/17/01 as a B2 visitor with authorization to stay until 01/15/02.

SUBJECT'S above could not provide any information relating to 09/11/01. FBI Special Agent **[redacted]** requested INS arrest those individuals in violation of Immigration Law. INS SSA **[redacted]** authorized arrest.

SUBJECTS were checked on the INS Watch List with negative results.

Investigator **[redacted]**	Date
Special Agent **[redacted]**	09/30/01

Exhibit B

FBI Interest Document for Ashraf Ibrahim

(produced by the United States)

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 09/20/2001

Salesman, **[redacted]** TRUCK CENTER, **[redacted]**, was advised of the official identity of the interviewing agent. **[redacted]** provided the following information:

[redacted] was working on Saturday, September 15, 2001 at approximately 10:30 a.m. when three males, who appeared to be Arabs, approached him and said they were interested in purchasing a truck. The men had initially inquired about a used truck, volunteering that the truck would be used to carry water. **[redacted]**, in an attempt to find them a truck that would fit their need, asked them the size of the containers in which the water would be stored, how much the load would weigh and to whom they were going to deliver. Their answers were vague. **[redacted]** was suspicious when they could not answer his questions, but believes some of the confusion could have resulted from them trying to convert measurements from the metric system. **[redacted]** eventually learned that they would be hauling 450 containers weighing 30 pounds each. He determined they would need a large truck. **[redacted]** TRUCK CENTER is an IZUZU dealer and **[redacted]** showed them a new 14-foot IZUZU truck with a 14,000 pound capacity. The truck was listed for $30,000.

Exhibit B

It was decided that a 10-foot truck would be adequate and **[redacted]**, who had none on the lot, told them he would check on how long it would take for him to get them one. One of the men gave him a business card which was printed in English on one side and what appears to be Arabic on the reverse side. The English side read, "Watermust Egypt Co., **[redacted]**, G. Manager, **[redacted]**, **[redacted]**, Phone: **[redacted]**, Fax: **[redacted]**, Watermust Inc., **[redacted]**, Phone: **[redacted]**, Fax: **[redacted]**." Handwritten on the English side of the card is the name **[redacted]** and the telephone number **[redacted]**. A graphic of a desert oasis is pictured on both sides. **[redacted]** provided the original business card to the interviewing agent. A copy of the business card is attached to and made part of this FD-302.

[redacted] looked up the telephone number on a CD-rom yellow page directory. The number came back to ASHRAF A IBRAHIM at the same address as WATERMUST, however the business name was not listed.

[redacted] described the male who gave him the business card as approximately 45 years old, 5 feet 10 inches to 5 feel 11 inches tall, 180 to 200 pounds, with medium length wavy black hair. The second male was approximately 30 years old, 5 feet 6 inches tall, and thinner than the other two at approximately 160 pounds. He spoke English with no accent. He gave **[redacted]** his cell phone number **[redacted]** and said his name was **[redacted]**. He wore jeans and a T-shirt. The third male

Exhibit B

did not give his name. He was approximately 45 years old and weighed 180 to 200 pounds.

[redacted] did not get a good look at the maroon colored car in which they drove away.

SUBJECT TO PROTECTIVE ORDER

Investigation on 9/18 & 9/20/01 at Philadelphia, PA

File # [redacted] Date dictated 9/20/01

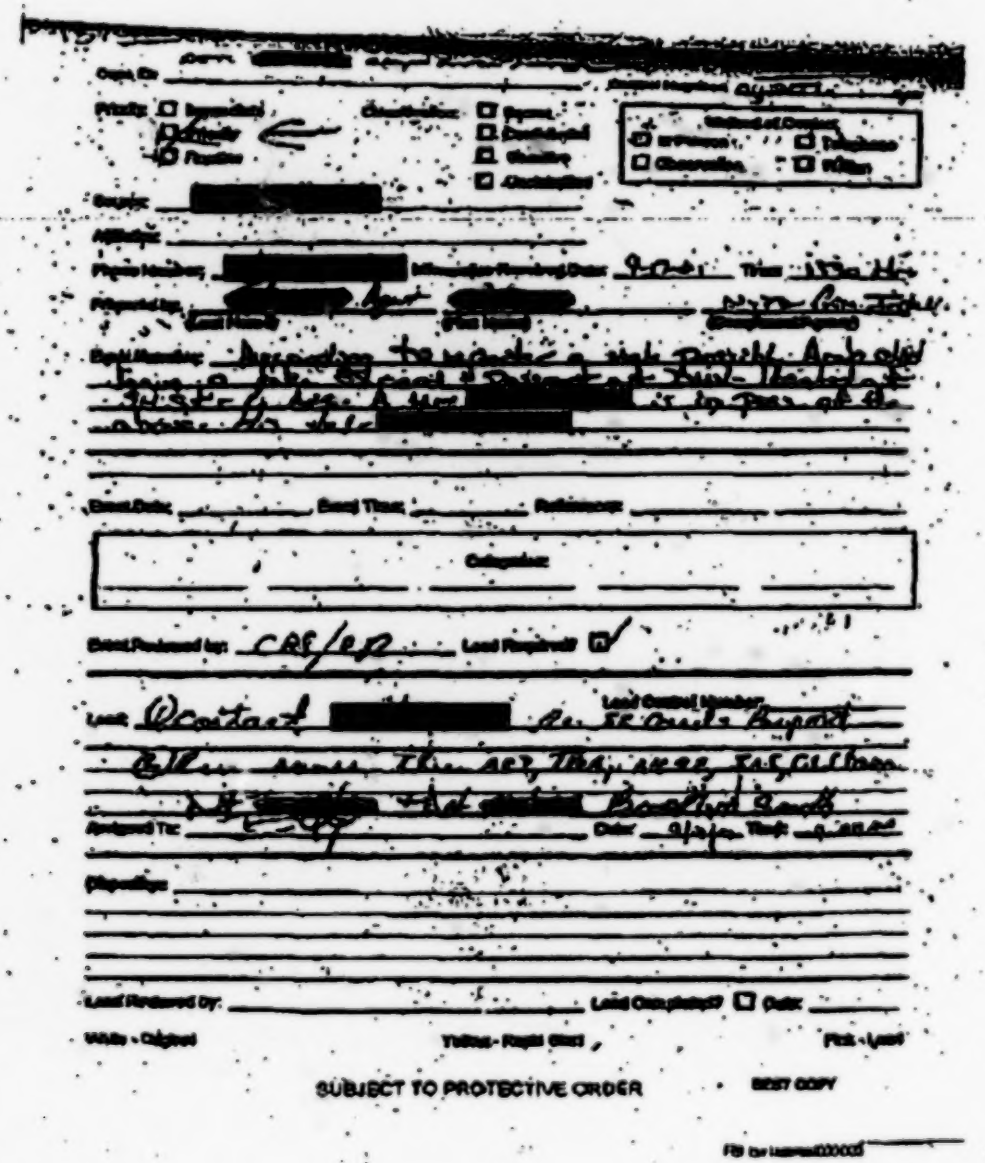
by [redacted] :jlw

BEST AVAILABLE COPY

Exhibit C

FBI Interest Document Shakir Baloch

(produced by the United States)



SUBJECT TO PROTECTIVE ORDER

BEST COPY

Exhibit D

FBI Interest Document Akhil Sachdeva

(produced by the United States)

Department of Justice
Immigration and Naturalization Service

MEMORANDUM OF INVESTIGATION

File Number	TitletControl Officer	
A76 022 813	SACHDEVA, Akhil	NYC

On the day of this writing, the writer and SA **[redacted]** accompanied FBI Special Agents **[redacted]** and **[redacted]** to the above-mentioned SUBJECT's addresses at 169 Port Washington Boulevard in Sands Point, New York. This was done pursuant to LIRA lead **[redacted]** in October, 2001, the Port Washington New York, Police Department was contacted by a concerned citizen who reported that he had overheard a conversation between two employees of a Getty Gas Station at **[redacted]** New York. This conversation was spoken in Arabic and English, and the citizen reported that in English, the employees had discussed flying and flight simulators. Subsequent interviews and investigation led the FBI to the SUBJECT. The SUBJECT was born on October 29, 1972 in New Delhi, India. NAILS records show that he first entered the United States on January 12, 1995, as a B1 visitor for business at Los Angeles, California. He was admitted to May 21, 1995. The SUBJECT overstayed this visa, remaining in the United States until July, 1998. He went

Exhibit D

to Canada after being issued a Canadian landed immigrant certificate in New York, NY on July 28, 1998. The SUBJECT attempted to enter the United States from Canada on January 10, 1999 via the Rainbow Bridge in Niagara Falls, New York. The SUBJECT freely admitted his prior overstay status and he was Served with a Notice To Appear (NTA) as an inadmissible alien. He was allowed to return to Canada to await his hearing before the Immigration Judge. The Order of the Judge dated December 6, 1999 reflects that the SUBJECT was ruled inadmissible to the United States per Section 212(a)(9)(B)(I)(II) of the INA. The Order by Judge MONTANTE, JR., PHILIP reflects that the Subject 'should be allowed to withdraw his application for admission.' The SUBJECT states that the judge lifted the time ban on reentering the United States. The SUBJECT reported that in March 2000, he entered the United States from Canada at Niagara Falls, New York. He states he was on a bus, and when approached by the Immigration Inspector showed Indian passport #S-214475 expiring 9/29/04 and Landed Immigrant of Canada certificate #W916445403. The SUBJECT stated that he lied to the Inspector when questioned as to his intended stay in the United States. He stated that he was only staying in the United States for a weekend to visit some friends in New York. The SUBJECT reports that on November 15, 1999 in Brampton, Ontario, Canada he married **[redacted]** **[redacted]** who according to CIS records became a naturalized U.S. citizen on September 28, 1999. CLAIMS records indicate that an I-130 was filed by **[redacted]** on the SUBJECT's behalf on March 7, 2000

receipt #EAC-00-113-51747. A denial notice was sent on March 1, 2001. The SUBJECT stated that he and **[redacted]** divorce was finalized in November 2001. Since May 7, 2001 to December 2001, the SUBJECT was employed as a clerk/gas station attendant at the Getty gas station **[redacted]** New York. The SUBJECT reports that his then spouse and **[redacted]** were partners in this business. The SUBJECT advised that he intermittently received an off the books salary of $450 per week for 75 hours work per week. He invested $45,000 of his own money in this business. The SUBJECT was arrested in New York, New York on July 21, 1998 for Possession Of A Forgery Device and Trademark Counterfeiting by the New York City Police Department. The SUBJECT states that he paid a $5,000 fine for these offenses. The SUBJECT states that he was involved in counterfeiting TOMMY HILFIGER jeans by putting the label on otherwise ordinary bluejeans. The SUBJECT's NYSID number is 8959977N. The SUBJECT was encountered at his residence at 6:15am and placed under arrest at 7:00am. Approval for the arrest was obtained from Section Chief **[redacted]** on December 19, 2001. The SUBJECT resided at his residence with **[redacted]** DOB: **[redacted]** and his wife who reported that they are naturalized U.S. citizens. **[redacted]** and his spouse are the owners of the house. **[redacted]** is reportedly the owner of a spice importing company. In addition to his passport and landed immigrant papers, the SUBJECT is in possession of New York driver's license #159779983 and Ontario driver's license #SOO43-01507-21029. The SUBJECT stated that he wishes to return to Canada

Exhibit D

as soon as possible. The FBI has no further interest in the SUBJECT relative to the PENTBOMB investigation.

SUBJECT TO PROTECTIVE ORDER

Investigator	Date
SA **[redacted]**	December 20, 2001

Exhibit E

FBI Interest Document Asif-Ur-Rehman Saffi

(produced by the United States)

28 February 2002

Subject: September 11, 2001 — ASIF UR REHMAN SAFFI

ASIF UR REHMAN SAFFI, date of birth: 16/06/1956, place of birth: Lahore, Pakistan, was detained on 30/09/2001 by Agents from the United States Immigration and Naturalization Service (USINS) after he attempted to enter Canada from the United States.

SAFFI is a Pakistani national holding dual citizenship with France by virtue of his marriage to a French national- **[redacted]** SAFFI was traveling under French passport #: 974010107806, as documented by his most recent entry into the United States on 06/07/2001.

SAFFI was refused entry into Canada by Canadian Immigration Authorities on 29/09/2001. He was allegedly traveling to Canada for the purpose of visiting a friend named **[redacted]**. Upon interviewing SAFFI, Canadian Authorities were not convinced that SAFFI had legitimate reasons to visit Canada. The Canadian investigators did not believe that SAFFI and **[redacted]** knew each other very well. SAFFI was also in possession of $1,400.00 in cash.

SAFFI was denied entry into Canada and placed on the next available flight to La Guardia Airport, New York

Exhibit E

City, whereupon he was arrested by USINS agents for violating his Visa status. SAFFI was admitted to the United States on 06/07/2001 as a Visitor under the U.S. Department of State's Visa Waiver Pilot Program. Nonetheless, SAFFI admitted to working while in the United States which violated the provisions of the Visa Waiver Pilot Program.

The New York Office of the FBI is currently investigating several of SAFFI's contacts. SAFFI's continued detention is dependent upon the results of that investigation.

2-DST
1-Paris ([redacted] OUT) serial 2304
059css01.nte

Case ID: [redacted] Serial: 2309

Exhibit F

FBI Interest Document Ibrahim Turkmen

(produced by the United States)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 10/02/2001

To: New York

From: New York
Squad C-27
Contact: SA **[redacted]**

Approved By: **[redacted]**

Drafted By: **[redacted]** :pc

Case ID #: **[redacted]**

Title: **[redacted]**
00:NY

Synopsis: Case Opening

Details: Case is predicated upon a lead arising from the World Trade Center investigation (NY control #**[redacted]**). Lead surrounded around several Turkish males living at **[redacted]** Long Beach, New York 11561.

Writer interviewed the landlord and several neighbors and identified that subject **[redacted]**, DOB **[redacted]**, SSAN **[redacted]** vacated the premise on

Exhibit F

Thursday 9/13/01. Writer was contacted by the Long Beach PD in the evening of 9/15/01 regarding the above mentioned apartment. The new tenant, **[redacted]**, DOB **[redacted]**, SSAN **[redacted]**, found documents that **[redacted]** had left behind and called the police. Upon getting consent from **[redacted]** writer searched the apartment and found a variety of photo documents, to include passports, drivers license, and Turkish birth certificates, in several different names. Also present was a lamination machine, fax machine, and computer accessories.

On 9/21/01 writer and SA **[redacted]** found and interviewed subjects **[redacted]**, DOB **[redacted]**, and **[redacted]**, DOB **[redacted]**, SSAN **[redacted]**. Both subjects were carrying false identification, were currently residing in the United States illegally, and neither was found to be credible when questioned. Both subjects were arrested by United States Immigration Service Agents, and currently await deportation.

On 9/28/01 writer was contacted by Long Beach Police Department that three Turkish males had tried to enter the apartment on **[redacted]** Street. The three individuals were **[redacted]**, DOB **[redacted]**, **[redacted]**, DOB **[redacted]**, and **[redacted]**, DOB **[redacted]**. Upon being interviewed **[redacted]** advised that he once lived with **[redacted]** at the Long Beach address listed above, and that **[redacted]** was making false identification for people from Turkey. This identification was to include false passports, NYS Drivers Licenses, bank account papers, and real estate

ownership papers. **[redacted]** admitted to helping **[redacted]** on several occasions by generating the paper work on **[redacted]** computer.

Assistant United States Attorney (AUSA) **[redacted]** Eastern District of New York, advised that he would commit to prosecuting this matter in violation of Title 18, United States Code Section 1028 (Fraud and related activity in connection with identification documents) if sufficient corroborative evidence was developed to support a federal criminal prosecution.

Exhibit G

Attorney General Daily Activity Report, Excerpted from INS Headquarters Standard Operating Procedures: Case Processing for Pentagon / Twin Towers Terrorist Investigation

(produced by the United States)

LIMITED OFFICIAL USE/LAW ENFORCEMENT SENSITIVE

INS HEADQUARTERS STANDARD OPERATING PROCEDURES: CASE PROCESSING FOR PENTAGON/TWIN TOWERS TERRORIST INVESTIGATION

Office of Field Operations
National Security Unit **September 23, 2001**

Subject to the Protective Order

* * *

Exhibit G

AG DAILY ACTIVITY REPORT

GUIDANCE

1. Attached is a copy of the Report Template. Responsibility for collating the data and finalizing the Report lies with the Headquarters Operations Center (Headquarters Coordinating Element, HCE). Responsibility for providing the necessary data is apportioned as follows:

Items 1,2	Headquarters Operations Center (based on data from the Field)
Items 3,4,5, 6,7,8,9	Headquarters Custody Review Unit (from data already collected for the Custody List)
Items 11,12	National Security Unit
Items 13,14	Headquarters Operation Center (based on Daily Regional Reports)

2. The Daily Activity Report will be collated and completed no later than 0600 each day. Until further notice, the report will be reviewed by the EAC, Ops and the Deputy Commissioner by either facsimile transmission or personally prior to transmission to the Department of Justice.

3. The completed and approved report will be sent no later than 0700 by facsimile ***and*** email as set forth below:

Exhibit G

Report due to: Janet Potter	(fax) 202-323-2863 (email) Janet. Potter @ USDOJ.gov
Susan Richmond	(email) Susan. Richmond @ USDOJ.gov

4. The ***Background*** section of the first Report will be eliminated in all future Reports.

5. The ***Notes*** section will consist of a narration of events relevant to the criminal investigation and the mission of the INS. These will be drawn from the SIR's and the reports received by the NSU. *Both the Operations Center and the National Security Unit have responsibility for providing information to the* ***Notes*** *section. Responsibility for collating the submissions lies with the Operations Center.*

6. The Commissioner said that the Attorney General uses this document to prepare for his daily briefing with the National Security Counsel and the President. Hence, all submissions in the ***Notes*** section must be succinct, verified and complete. In deciding what to include, the Commissioner said to err on the side of inclusion. The goal is to provide the AG with everything he needs to brief the NSC and the President about our activities and operations during the emergency.

7. Regions have been advised to provide the necessary information regarding Items 1 and 2 to the HQ Operations Center no later than 0500 each day until further notice.

Exhibit G

LIMITED OFFICIAL USE

TERRORISM INVESTIGATION
INS ACTIVITY REPORT
SEPTEMBER 23, 2001

	ACTIVITY	Past 24 Hours	Cumulative
1	Joint Field Interviews with FBI		330
2	Number of Aliens Taken Into Custody During Joint Field Interviews *After* Which It Is Determined There is No Nexus to the Investigation		Being Counted
3	Total in INS Proceedings		80
	a. Immigration Court Served with Charging Documents	0	42
	b. Immigration Court Not Yet Served	0	26
	c. Final Orders of Removal	0	12
4	Number of Aliens in INS Custody	10	88
5	Number of Aliens in State and Local Custody	0	2

Exhibit G

	ACTIVITY	Past 24 Hours	Cumulative
6	Number of Aliens in U.S. Marshals Service Custody	0	13
	a. Held on FBI Criminal Charges	0	0
	b. Held on INS Criminal Charges	0	4
	c. Held on Material Witness Warrants	0	8
7	Number of Custody Transfers to Secure Facilities	2	35
8	Number of Bond Hearings Scheduled	0	29
9	Number of Bond Hearings Completed	0	0
10	Total Number of Aliens Released	0	2
	a. On Bond	0	0
	b. No Terrorism Nexus (as determined by FBI)	0	2
11	Agent Support Provided by INS to the SIOC	6	6
12	Attorney Support Provided by INS to the SIOC	4	4

Exhibit G

	ACTIVITY	Past 24 Hours	Cumulative
13	Ports Closed Due to Threats	0	2
14	Bomb Threats to INS Facilities	1	32
15	**NOTES:** All ports of entry continue to operate at Threat Level 1; the INS "War Room" continues to operate 24/7; the attorney/investigator task force continues to operate 24/7 with a personnel complement of approximately 30. During the past 24 hours an event occurred that has received press attention. During a joint search warrant operation in Florence, Kentucky focused on specific individuals at a specified address, a group of Muslims who were attending a religious service in an adjoining apartment (not marked as a religious sanctuary) began to exit the building. An INS agent who was on the perimeter was surprised by this exit activity and called for back-up. Forty-eight individuals were held for questioning. Forty-four individuals were released and four were held by INS based on their status as visa overstays. At the time of the operation, neither the FBI nor the INS was aware of the religious service in the adjoining apartment and the participants were not the targets of the investigative operation.		

	ACTIVITY	Past 24 Hours	Cumulative
16	**Background Information:** The INS has developed a substantial number of new leads for the FBI's investigation (a) through the joint interview process, (b) by checks of individuals on the FBI's interest/watch list through a number of our automated systems, and (c) through liaison with friendly foreign immigration services. Since September 11, INS has supported the FBI investigation into the terrorist attacks by mining INS databases for information relating to suspected hijackers, their associates and their travel and movements prior to the attacks. Over 1,000 leads have been provided to the FBI SIOC, including documentary leads from our Students/Schools database, our Arrival and Departure database and files relating to specific individuals that the FBI has identified as of interest. Of the INS's on-duty workforce of 1,829 special agents, over 850 agents have been working in support of the FBI investigation, either directly through joint investigations and lead follow-up, or indirectly through research and file review. This constitutes more than 50% of the Investigations Division workforce of the INS.		

Exhibit G

ACTIVITY	Past 24 Hours	Cumulative
Operation Safe Passage has committed 308 Border Patrol Agents to support existing Airport security operations in eight airports around the United States. INS agents, working on their own initiative or with Department of Transportation, have conducted investigations to determine whether persons with access to secure and restricted areas are present in the United States in violation of immigration law. Three arrests have been made. Meanwhile, the business of the Immigration Service has continued. Ports of Entry and Inspections facilities at our borders have remained fully operational, as have District Offices that have served the public continuously since September 12, despite a total of 32 bomb threats against INS facilities since the attack. INS has naturalized 25,000 new citizens since September 11, has conducted thousands of interviews and approved benefits to hundreds of qualifying immigrants. In addition, INS District Directors have met with Muslim leaders in various communities around the country to allay fears and commit to collaborative communication.		

Exhibit H

Significant Incident Report for Akhil Sachdeva

(produced by the United States)

SIGNIFICANT INCIDENT REPORT

FROM: NYC INV

TO: HQ HCE FAX# 202-305-2786
HQ NSU FAX# 202-514-6557
ERO CP FAX# 802-660-5100

THE ALIEN(S) LISTED BELOW WHOSE FORMS I-213 ARE ATTACHED TO THIS REPORT WERE ARRESTED AFTER HAVING BEEN ENCOUNTERED IN THE COURSE OF A FIELD INVESTIGATION.

THE FIELD INVESTIGATION WAS PREDICATED UPON RECEIPT OF A FBI WORLD TRADE CENTER (WTC) LEAD.

FBI INVESTIGATIVE INTEREST IS CURRENTLY UNDETERMINED.

ALIEN FILE MATERIAL IS BEING TRANSMITTED TO HQ NSU UNDER SEPARATE COVER.

NAME(S):	ALIEN #:
[redacted]	**[redacted]**
SACHDEVA, AKHIL	A 76 022 813

Exhibit I

Excerpts from JTTF "Special Interest List"

(produced by the United States)

JTTF SPECIAL INTEREST CASES

Name
[redacted]

A#

MW
N

JTTF
Special Interest
Y

INS Det
N

Custody
N

Custody Location
RELEASED

Investigator
Agent **[redacted]**

AUSA
[redacted]

Exhibit I

Alias

Hearing Date:

Disposition:

Summary: 10/9/01 UPDATE: SUBJECT RELEASED FROM MCC

WARRANT VACATED 10/4/01. **[redacted]**

MW WARRANT ISSUED 9/20/01 (JUDGE **[redacted]** -LA); ARRESTED IN LA; ARRIVE SDNY. HE WAS CO-INSURER ON AUTO INSURANCE POLICY W/ NAWAF AL-HAZMI (HIJACKER-AA #77 – PENTAGON). ACCOMPANIED AL-HAZMI TO A FLIGHT SCHOOL IN SAN DIEGO. ACTED AS INTERPRETER FOR AL-HAZMI AND AL-MIHDHAR SA **[redacted]** B# **[redacted]**

Exhibit I

Name
[redacted]

A#
[redacted]

MW
Y

JTTF
Special Interest
Y

INS Det
N

Custody
Y

Custody Location
SAN DIEGO

Investigator
Agent [redacted]

AUSA
[redacted]

Alias

Hearing Date:

Disposition:

Exhibit I

Summary: PER SA **[redacted]** 11/29/01: BEING PROSECUTED FOR INS VIOLATIONS IN THE SOUTHERN DISTRICT OF CALIFORNIA. 11/2/01 UPDATE: TO BE CHARGED WITH INS VIOLATION IN SAN DIEGO.
RULE 40 PROCEEDING 10/25/01. TO BE CHARGED WITH MARRIAGE FRAUD IN SAN DIEGO (RELEASED FROM MCC). 10/23/01 UPDATE: **[redacted]** WILL BE ARRESTED ON IMMIGRATION FRAUD CHARGE FROM SAN DIEGO WHEN **[redacted]** TESTIMONY COMPLETE.
10/17/01 UPDATE: ADMITTED ACQUAINTED WITH HIJACKERS NAWAF AL-HAZMI AND KHALID AL-MHDHAR. STATED AL-HAZMI INTRODUCED HIM TO HANI HANJOUR.
10/14/01 UPDATE: **[redacted]** CHARGED WITH FALSE STATEMENTS IN SAN DIEGO.
10/9/01 UPDATE: ASSISTING INVESTIGATORS VIA PROFFERS. PROVIDING MOSTLY CIRCUMSTANTIAL INFORMATION.

PRESENTMENT IN SAN DIEGO 9/24/01 ADJOURNED UNTIL 9/25/01 TO ARRANGE FOR ARABIC TRANSLATOR. INTERVIEWED BY FBI 9/18/01. CLOSE TIES W/ NAWAF AL-HAZMI (AA#77)

Exhibit I

AND KHALID AL-MIHDAR (AA#77)
[redacted]
SA **[redacted]** C# **[redacted]**

Name
BALOCH, SHAKIR, ALI

A#
A78513988

MW
N

JTTF
Special Interest
Y

INS Det
Y

Custody
Y

Custody Location
MDC

Investigator
Agent **[redacted]**

AUSA
[redacted]

Exhibit I

Alias: BALOCH, SHAKIR, KURD, FAISAL

Hearing Date:

Disposition:

Alias BALOCH, SHAKIR;KURD, FAISAL

Summary: 2/7/01 SUBJECT CLEARED IN ORDER TO PLACE HIM IN MDC GENERAL POPULATION AS A RESULT OF A LEGAL MOTION. AGENT **[redacted]** WILL CONTINUE TO INVESTIGATE POTENTIAL TIES TO TERRORISM WHILE SUBJECT REMAINS INCARCERATED ON CRIMINAL CHARGES.
2/5/02 UPDATE: AGENT **[redacted]** ADVISED THAT SUBJECT HAS BEEN INDICTED FOR FRAUD BUT IS STILL OF INTEREST.
RE-ASSIGNED SA **[redacted]**
Det. **[redacted]** C-11 has ticket on prosecution.
AUSA **[redacted]** **[redacted]** SA **[redacted]** ADVISED AS OF 11/19 THAT SUBJECT WILL BE PROSECUTED IN THE SDNY FOR FRAUDULENT DOCUMENTS AND INS REENTRY. MAY BE CONNECTED TO ONGOING C-7 INVESTIGATION.
10/5/01 AGENT **[redacted]** ADVISED BALOCH ARRESTED AS ENTERING ADDRESS OF **[redacted]** (**[redacted]**

Exhibit I

WHO WAS ALSO ARRESTED PURSUANT TO INFO DEVELOPED FROM FBI LEAD [redacted] BALOCH IN POSSESSION OF FORGED LICENSES, ETC. AGENT [redacted] IS PURSUING WARRANTS, CHARGING FRAUD, FOR TWO OTHER DETAINEES: [redacted] ([redacted] AND [redacted]) (ADVISED 10/5/01 IN MDC).
*** SA [redacted] SPOKE W/ [redacted] INS [illegible] 11/6 RE SUBJECT. WAS DEPORTED TWICE BEFORE.

Name
IQBAL, JAVAID MUHAMMAD

A#
A74889427

MW
N

JTTF
Special Interest
Y

INS Det
Y

Custody
Y

Exhibit I

Custody Location
MDC

Investigator
Agent **[redacted]**

AUSA
[redacted]

Alias
ABDUL KHALIQ; MUHAMMAD MUMTAZ

Hearing Date:

Disposition:

Summary: 1/31/02 update: ASAC Maxwell assigned to SA **[redacted]** I-44 follow-up.
01/24: LEFT MESSAGE FOR SA **[redacted]** RE WHERE IS FILE? AGM
ASSIGNED TO SA **[redacted]** C-28, **[redacted]** BUMAILED FILE TO LIRA 11/16. SA **[redacted]** SWORE COMPLAINT 11/5/01. AUSA **[redacted]** EDNY.
CHARGED W/ MAKING FALSE STATEMENTS (18 USC 1001(a)).
SUBJECT USING FRAUDULENT PAKISTANI PASSPORT
01/11 AGENT **[redacted]** INV COMPLETED, TO SEND FILE 01/14. SUBJECT BEING CHARGED CRIMINALLY BY INS.

Exhibit I

Name
SAFFI, ASIF URREHMAN

A#
A78558121

MW
N

JTTF
Special Interest
Y

INS Det
Y

Custody
Y

Custody Location
MDC

Investigator
Agent [redacted]

AUSA

Alias
SAFI, ASIF, SAFI, ASIF-UR-REHMAN

Hearing Date:

Disposition:

Exhibit I

Summary: 3/1/02: SUBJECT WILL BE DEPORTED TO FRANCE ON 3/5/02
1/17/02 UPDATE: FILE RETURNED TO DET. **[redacted]** I-46, FOR FOLLOWUP WITH **[redacted]** PER ASAC MAXWELL
01/15: FILE RETURNED BY DET **[redacted]** COMPLETE, N/I.
DET. **[redacted]** **[redacted]** CONTACTED I44A ON 12/5 – HE INQUIRED OF CUSTODY LOCATION; WILL INTERVIEW. REASSIGNED TO DET **[redacted]**
FILE GIVEN TO JTTF FOR RERVIEW OF ACS HITS PER ASAC MAXWELL.
REASSIGNED 10/9/01 TO SA **[redacted]**
ADDITION 10/01/01

Exhibit J

Memo from Michael Chertoff to Dale Watson re: Investigation of Indivdiuals under Detention Pursuant to "Project Lookout," with handwritten notes,

(produced by the United States)

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D.C. 20530*

MEMORANDUM [DRAFT]

TO: Dale L. Watson
Assistant Director
Counterterrorism Division
Federal Bureau of Investigation

FROM: Michael Chertoff
Assistant Attorney General

SUBJECT: Investigation of Individuals under Detention Pursuant to "Project Lookout"

In the wake of the terrorist attacks that occurred on September 11, 2001, and to avert further attacks, the FBI created a "watchlist" of individuals wanted for questioning to determine whether or not they had information concerning these and any planned terrorist attacks. TheFBI continuously updates this watchlist. As of this date, approximately 160 of these individuals are in custody, primarily on immigration related charges. It is incumbent upon us to determine expeditiously which

of these individuals were involved in or may have information related to these or other planned terrorist acts. Those individuals must remain in custody because they pose an imminent danger, and a determination must be made as to whether they should be charged. As to those we determine have no connection, they should be treated as any similarly situated alien would be treated under our immigration laws. We can neither detain these individuals indefinitely without cause nor release dangerous individuals into the general population.

It is essential that the decision as to whether or not to seek continued detention is made centrally by headquarters rather than by individual field offices. The decision as to whether a particular individual has pertinent information or poses a threat must be made in the broad context of the centrally coordinated investigation of the September 11 terrorist acts as well as the context of on-going and continual threat assessments. No individual field office has complete enough information to make this determination alone. For this reason, agreed upon procedures for the handling of all detainees are necessary.

On September 25, 2001, Associate Deputy Attorney General Stuart Levy convened a meeting of representatives of the FBI, INS, the Civil Division and the Criminal Division to establish procedures to ensure the prompt determination of the need for continued detention of these individuals. The process that was agreed upon at that time requires the FBI to interview each detainee and to provide results of that interview

to FBI SIOC and to the INS attorney in the field. The FBI must also verify that the detainee is not the subject of or otherwise involved in any FBI intelligence investigation. It is essential that this determination be made both by the field office and by headquarters. The ultimate decision as to whether a particular detainee is or is not of interest to the FBI — based on an interview of the detainee and a review of pertinent intelligence investigations — is to be made by FBIHQ, not by individual field offices.

[redacted]

I am asking you to take the following steps to obtain the necessary information and facilitate this process:

- [10/2 EC covers] Each of the individuals in detention must be interviewed ~~promptly~~[on a priority basis], the relevant indices must be checked, and intelligence information and investigations reviewed, and the results of these inquiries should be supplied by the SAC or designated ASAC to FBIHQ with appropriate supporting documentation. This information should include the basis for the initial interest in the individual, the subsequent information developed, and the reason that there is no longer any interest in the individual. These interviews should be handled on a priority basis.

- [FBI call:] Each field office with detainees should designate at least one agent to promptly interview the detainees in that district. These interviews should be handled on a priority basis.

Exhibit J

[redacted]

It is important that these aliens in detention are handled appropriately to make sure that those who are of investigative interest continue to be detained and those who are not of interest are handled by INS in the manner that similarly situated aliens would be handled. Your efforts in this regard are greatly appreciated.